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POWERS OF  
THE AMERICAN PEOPLE



# POWERS OF THE AMERICAN PEOPLE

CONGRESS, PRESIDENT, AND COURTS

(ACCORDING TO THE EVOLUTION OF  
CONSTITUTIONAL CONSTRUCTION)

BY

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TO  
NARCISSA HAYES

OF  
BALTIMORE

AS A SINCERE APPRECIATION OF MANY KINDNESSES,  
THIS VOLUME IS DEDICATED





## PREFACE

**A**N investigation of the powers of any people may be conducted from various standpoints and along various lines. It may be confined to strictly economic lines, it may embrace their arts and sciences, or it may include a discussion of the works of great scholars, and may thus be made from the viewpoint of the American, the English, German, or French scholar.

But whoever the investigator may be, he should not fail to observe the fact that the ceaseless progression of mankind has ever been welding the human family into a unit. In that progress, all governments—be they aristocratic, monarchical, or republican—are undergoing a process of evolution. Whether or not the progression seems to result in undue advantages by one nation as against another, it tends to the ultimate good of the human family. Whether the nations like it or dislike it, whether they approve it or disapprove it, they are steadily approaching international amalgamation through a higher humanity and a newer civilization. The American people are inseparable and integral parts of this larger movement toward a common human destiny. Nor is there anything utopian, puerile, or idealistic in the theory of such a movement.

No matter what standpoint the investigator may take, he cannot exclude from consideration such questions as these: Is not that form of government best which is conformable to

changing conditions and which agrees with the will of those in whose behalf it is established? Can any parallel in the history of nations be found to what is occurring in America under our very eyes? Can any parallel be found to such a revolution as is peacefully approaching completion under the form of the American Government? All the nations of earth are struggling, like the American, for a complete equality of individual condition and opportunity. A discussion of the American form of government includes, therefore, an investigation of more than that particular form of government. It is rather a discussion of the future of the world and of mankind.

The author has chosen as his particular field of investigation the Constitution of the United States. The field, therefore, may be said to be limited. But it is a most necessary limitation. Even with such a limitation, he confesses that the subject is too broad and great for the reach and scope of his conception and treatment. All that he ventures to do is to seriously attempt a search for the powers of the American people, Congress, President, and courts, in their bearing upon the daily affairs and transactions of American life. In that search he begs to say, as he said in the preface of the first edition: "No argument would seem to be necessary to prove the importance of instructing the students of government in the theory and practice of these powers. The impression has largely obtained among students of government and others in the world that because of its newness the American system could present little of interest or value to the investigator; it has been also believed by many that the American system was inimical to the Old World systems. If this work shall be one of the means of removing such impressions it will have accomplished its purpose. In preparing it, it has been the endeavor of the author to set forth the clauses of the Constitution upon which each of the four fundamental

powers rests, as well as the construction that has been given them by the authoritative exposition of the courts, or by the well-established practice of the Government of the United States."

The author takes the liberty of expressing his appreciation to many American gentlemen who have called his attention to objectionable parts of the first edition, or have sent kind acknowledgments of the former work, which, often accompanied by their views, pamphlets, or sympathetic encouragement, have been invaluable to the author. In this connection he feels especially indebted to Prof. Simon E. Baldwin of Yale University; Judge W. W. Morrow; Judge Stanton J. Peelle; Hon. William Loeb, Jr.; Prof. Enoch G. Hogate of Indiana University; Hon. Joseph R. Knowland; Hon. J. N. Gillet; Hon. C. F. Curry of California; Governor A. E. Mead of Washington; Governor G. E. Chamberlain of Oregon; Governor G. L. Sheldon of Nebraska; Governor C. N. Haskell of Oklahoma; Governor J. K. Toole of Montana; Governor F. H. Gooding of Idaho; Chief Justice Fuller, Mr. Justice Brewer, of the United States Supreme Court; Prof. C. William A. Veditz; Hon. James B. Scott; Hon. Herbert Putnam; Hon. Edward B. Moore; Hon. Thorvald Solberg; Mr. T. J. Taylor; Mr. A. S. Langille; Mr. Walter B. Wooden of Washington, D. C.; Hon. Oswald Tilghman of Maryland; Governor Harris of Ohio; Governor C. A. Swanson of Virginia; Governor Edwin S. Stuart; Mr. William W. Smithers of Pennsylvania; Governor Dawson of West Virginia; Governor Warner of Michigan; Governor Curtis Guild, Jr., of Massachusetts; Governor John A. Johnson of Minnesota; Governor Charles E. Hughes of New York; Hon. Hoke Smith; Hon. E. W. Hoch; Hon. N. C. Blanchard; Hon. William J. Bryan; Hon. Perry Belmont; Hon. Oscar Straus; Hon. V. H. Metcalf; Hon. William H. Taft; Hon. Joseph G. Cannon; Hon. Charles W. Fairbanks. Last, the author most respectfully

tenders his heartfelt gratitude for the kind words of Hon. Theodore Roosevelt, the President of the United States.

Turning to the Empire of Japan, the author must, first of all, tender his gratitude for the inexpressible honor conferred upon his former book by Count Koken Tanaka, Minister of State for the Imperial Household, by its presentation to His Majesty, the Emperor of Japan. He must also express his deep-felt appreciation to Count Shigenobu Okuma, ex-Premier of Japan, and Hon. Teiichi Sugita, Speaker of the Imperial House of Representatives of Japan, for writing the introductory prefaces calling upon the people of Japan to read "Powers of the American People." Among many other friends who have given self-sacrificing efforts for the success of his book, the author should here add his expression of profound appreciation and thanks to Hon. Kametaro Hayashida, Chief Secretary; Mr. Kiichiro Ichio, formerly of the Tokyo Imperial University; Mr. Jennosuke Okudo, formerly presiding Judge of National District Court of Osaka; Mr. Mannosuke Ogino, of Osaka; Mr. Jiushiro Kato, formerly of Keiogijiku University and member of Prefectural Legislation; Mr. Suichi Hara, of the Department of Justice; Hon. Midori Komatsu, of the Japanese Foreign Office in Korea; Hon. Kumakichi Oishi, Representative; Hon. Masutaro Takagi, Representative; Prof. Takeo Kikuchi, President of the Tokyo Bar Association. The author also adds his sincere thanks to those many silent helpers who will share with him the ultimate success of the aim of the book.

Not one of these American and Japanese gentlemen, however, is responsible for any of the views, statements, or conclusions reached by the author. He has written this book without their assistance, and absolutely according to his independent ideas, as well as according to the results of his own researches and in his own words.

The author avails himself of this opportunity to express his thanks to those reviewers of periodicals and newspapers whose attention and consideration helped to give the former edition a place before the public. He is also thankful for that attitude which did not make his faulty English diction a strong ground for criticising his work, but which rather appreciated the fact that the writing of the author has heretofore been literally at a right angle to that which he is now using and that he has tried to write of the fundamental principles of Americanism for an American audience. Hostile and prejudiced criticism can very easily ignore the fundamental idea which connects the several parts of an author's work, and attack an isolated fact without considering the entire body of facts, or an isolated idea without considering the entire body of ideas, he puts forth. But fortunately, the author's critics have encouraged him by reading the spirit which guided his labor, impelling him onward in his efforts to continue his investigation of the powers of the American people, powers which he firmly believes mark the beginning of the realization of the brotherhood of man.

This edition has been carefully revised throughout; all criticisms, objections, and controverted points have been thoroughly considered. All sections and some chapters have been abridged, and extensive additions have been made. In view of the fact that the book has filled a peculiar field in America and in foreign countries, it has been necessary to make some changes from technical to popular form, so that it may be read by all classes—in professional chamber or lecture-room, as well as by the people at their firesides. The author has not considered it advisable to put forth an encyclopedic volume, especially anything in the nature of statistics, for fear that a book so voluminous and statistical might prove subversive of the purpose in view. Although he has made careful selections from the best material,

he fears that this edition is already too voluminous. With reference to similar books, he has been lost in admiration when he has seen what so many great men in America, England, Germany, and France have said before him on the subject. However, he did not lose courage, but remembered with Montesquieu that "Plato thanked the gods that he was born in the same age with Socrates."

He must here state that in writing this work he has entertained no design of serving or attacking any other writers' views, any political party, or any other form of government. In comparing it with the European and Japanese forms of government, he has put special emphasis upon the American form of government, to be sure. But that was done in the hope that the peculiar government form under investigation might be pointed out conspicuously, characteristically, and distinctly. If this book should fortunately meet the approval of its readers, the author owes it largely to the excellence and majesty of the subject treated.

MASUJI MIYAKAWA.

WASHINGTON, D. C., June 1, 1908.



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PART I  
THE PEOPLE



## CHAPTER I

### THE PEOPLE

WE, THE PEOPLE of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.—*Preamble of the Constitution of the United States.*

THIS prominent term, the people, in the American acceptation is entirely different from the term as used in European and Asiatic countries. This distinct and different meaning is unknown to doctors of laws in these countries, no matter how thoroughly versed they may be in the principles of law, unless they receive the significance of the term in the true American acceptation. By the expression, the people of the United States, is meant, from the American standpoint, the whole mass of both male and female citizens, which constitutes the political unit. The American people are identified as a political entity, an artificial being, and are not a mere majority of the persons composing society or those having the right to vote. The people are the very creator of the whole fabric of the American Government, and the motive god that rules the American universe, whom both individuals and groups of individuals are bound to obey. When the people once determine a thing there is no appeal from it. They are above the Constitution.

The American people, therefore, from every point of view,

are sovereign, omnipotent, and can do no wrong. They are fallible only by their own free will and voluntary act. They alone have the power of expressing a command.

The precise location of the sovereignty in England is in Parliament; in Japan, in the Emperor; and in America, in the people. England sinks or swims with Parliament; Japan rises or falls with the Emperor; America, without the political entity of the people, could not exist; it is the very breath by which it lives.

According to Blackstone's Commentaries, we find that the word "people" is used in the sense of subjects and not in the sense of the body politic or a part of it. The English reader will nowhere find "the people" as the American will find it in the laws of his country. In England, the people do not exist in strict legal contemplation. The sovereignty of England is in Parliament, and this principle became, says G. Mayer, "the settled doctrine under the reign of Victoria." Bryce emphasized this when he said: "The British Parliament has always been and remains now a sovereign and constituent assembly. It can make and unmake any and every law, change the form of government or the successor to the crown, interfere with the course of justice, extinguish the most sacred private rights of the citizens"; except, joins De Lolme, "to make woman to man, and man, woman." According to Bornhak, the people in Germany hold a very different legal relation to the Emperor than that assumed by them in America to the Government. Zorn is of the opinion that the German Empire may be a "Republic." That is as it may be, but it is worthy of reflection that in Germany what power is not limited by the Constitution, the princes have, they being entitled to the residuum of the power. The German Government, says Munsterberg, "is not elected by the people, nor dependent upon them." In France, the President



is chosen, not by the people, but by the Chamber and Senate, and when interposition becomes necessary between the legislative and the executive departments the matter is carried to the ministry and decided by them, and not by the people. "Intolerable powerlessness and practical uselessness marks the President under the existing Constitution," says Casimir-Périer. In the French Republic the people are not recognized as they are in the American Republic, although France molded its government on the spirit of republicanism. And, in the expression of B. Wendell, "We shall be truer to the full splendor of the past if we salute the Republic as France, and not France as the Republic. Nothing less than the utmost can comprehend it all."

The French, Japanese, Italians, and Spanish are more tolerant and dependent than the Americans in affairs of government; they practically exclude themselves from the benefits of government by their stand that the government is one thing and the people another, seemingly disregarding the American proposition that it is, or it should be, the will of the people which controls the government. In Russia, the people, as the American understands it, is the "Czar," Douma or no Douma. The present Czar made very clear what is meant by the people of Russia when he publicly announced: "Let all know that in devoting my strength to the welfare of the people I intend to protect the principles of autocracy as firmly and unswervingly as did my late and never-to-be-forgotten father." The ultra-conservative Constitution of China, pictured in its unwritten law, serves to show the people of that most ancient Empire of Asia that "to govern means to rectify; if the people are led with correctness, who will dare not to be correct? The relation between Superiors and Inferiors is like that between the wind and the grass; the grass must bend when the wind blows across it." Whether the Chinese have or have not any written Con-

stitution, the spirit of this declaration lives there. The well-known declaration of Louis XIV, "I am the State," is not extinct, but still survives and serves the teaching of Hozumi. The word people, according to Ito, has a peculiarly interesting definition. The *Komin*, or the people of Japan, are *Omi-takara*, or the "public treasure." Prince Ito endeavors to convince us by his allegation that "there had been instances of the people calling themselves the Emperor's treasures, as may be seen in the following poem: 'Happy are we, His Majesty's treasures, to have an ample recompense for our earthly existence in having been born at an epoch so full of prosperity and glory.'"

The only country in which the sovereign will of the people is absolutely practical and real is America; on the other side of the Atlantic and Pacific oceans the sovereignty of the people has no existence. The sovereignty or supreme power resides in the body of the people in the American contemplation. In the eyes of the American people the government is a mere agency, established by the people for the exercise of those powers which reside in them, and no portion of sovereignty resides in the government; while Englishmen believe the right of sovereignty resides in those hands in which the power of making laws is placed. According to the Japanese Constitution, "the Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal," which is to be construed that the Emperor on his throne combines in himself the sovereignty of the state and the government of the country and of the people. This construction is founded on the traditional Imperial declaration that "We shall reduce the realm to tranquillity and bestow our loving care upon our beloved subjects."

What a contrast, an absolutely differing theory and practice of the right of governing! It is clear to all that sovereignty is not recognized in American law in the same sense in which

it exists under the Japanese and English constitutions, for while in the Island Empire on the other side of the Pacific it has its being in a divine and sacred right in the person of the Emperor, in the Island Empire on the other side of the Atlantic it exists as a right, a substantial right, an absolute right, in a corporate body, a person, *i.e.*, Parliament. A line of demarkation most sweeping was drawn by Chief Justice Jay when he said: "In Europe the power is generally ascribed to the princes, here it exists with the people; there the Sovereign actually administers the government; here, never in a single instance. Our Governors are the agents of the people, and, at the most, stand in the same relation in their relation to their sovereign in which regents in Europe stand to their sovereigns. Their princes have personal powers, dignities, and pre-eminence; our rulers have none but official; nor do they partake in the sovereignty otherwise or in any other capacity than as private citizens."<sup>1</sup>

In the very beginning the union of the States was never purely artificial or arbitrary. It had its commencement in the colonies, in their dependence on each other, their common origin, their mutual sympathies, their kindred principles; even the geographical relation of one to the other awakened a strong feeling of brotherhood, which was confirmed and strengthened by the necessities and dangers of war. This feeling developed, and received definite form, character, and sanction from the Articles of Confederation. By these the Union was solemnly declared to be perpetual; but when these Articles were found to be inadequate to the exigencies of the country, the Constitution was ordained, "to form a more perfect Union." It is difficult to convey the idea of indissoluble unity more clearly than by these words. What can be indissoluble, if a perpetual

<sup>1</sup>2 Dall. 472.

Union, made more perfect, is not? But these terms, "perpetual," "indissoluble," by no means imply the loss of a distinct and individual existence, or of the right of self-government by the States. Each State under the Articles of Confederation retained its sovereignty, freedom, and independence, and under the Constitution also retained every power, jurisdiction, and right which was not delegated to the United States. True, the States were much restricted in their powers; still, all powers not delegated to the United States or prohibited to the States are reserved to the States respectively or to the people. A feature which must be observed is that each State is safeguarded by the Union of States. We have had occasion to note that the people of each State compose a State, having their own government, enjoying all the functions essential to separate and independent existence, and that without States in the Union there could be no such political body as the United States. Not only, therefore, is it shown that no State sustains any loss of separate and independent autonomy by reason of this Union of States, but that the preservation of the individual States and the maintenance of the State governments is as clearly and emphatically the design and obligation of the Constitution as the preservation of the Union and the upholding of the National Government. The intention of the Constitution is expressed in the following words: "The Constitution in all its provisions looks to an 'indestructible Union composed of indestructible States.'"<sup>2</sup> The one depends upon the other and derives existence from the other.

In Europe and Asia the national sovereignty is personified in the rulers of the respective countries. The name or title of the sovereign head of monarchies is often fixed by their respective laws: for instance, "His Majesty the Emperor of Japan,"

<sup>2</sup>7 Wall. 700.

by the Constitution, the "Emperor of Germany," by the Code; but in this country every citizen is a sovereign like every other citizen. The officials, including the President of the United States, are merely the servants of the people, so that there can be no occasion to personify the American sovereign head, the people.

There is, however, one thing which is revered, sanctified, and revered as the symbol of American sovereignty and as the real emblem of the people, viz., the flag of Stars and Stripes. The nature of the free institutions of America demands that this point be made emphatic. Should any American, naturalized or natural born, not take pride in the flag, it points to the conclusion that he has no business or right to receive protection at the expense of the people. In Japan the public law provides that it is the national crime for any person to insult or cause the Imperial family to be insulted,<sup>3</sup> and the Imperial Constitution commands that "there shall be no irreverence for the Emperor's person, but also shall he not be made a topic of derogatory comment nor one of discussion." In contrast to this, we find another American characteristic in that there is nowhere a provision, either in the Constitution or in any portion of the national laws, to punish the person who insults the American flag. It is provided, however, "that on the admission of every new State into the Union one star be added to the flag of the Union, and that such addition shall take effect on the Fourth of July next succeeding such admission."<sup>4</sup> Looking into the State laws, we will find a demonstration of the theory that the United States is composed of "indestructible States" in this, that almost all State laws provide a punishment for any person insulting or causing to be insulted the flag of the nation.

<sup>3</sup>Japanese Criminal Code, Secs. 116-119.

<sup>4</sup>U. S. Statute approved April 4, 1818, Sec. 2.



When the question arises as to the unconstitutionality of a State law punishing such an offender, prosecution of whom naturally seems to be within the national province, and where the nation provides no law, the Supreme Court of the United States had this to say: "So a State may extend its power to strengthen the bonds of the Union, and therefore, to that end, may encourage a like feeling towards the States. One who loves the Union will love the State in which he resides, and love both of the common country and of the State will diminish in proportion as respect for the flag is weakened. Therefore, a State will be wanting in care of the well-being of its people if it ignores the fact that they regard the flag as a symbol of their country's power and prestige, and will be impatient if any open disrespect is shown towards it."<sup>5</sup>

This Constitutional construction, made in 1907, so far as the residuary sovereignty of each State is concerned, is identical with the construction declared a century ago on the same point, that the absolute sovereignty of each State, not granted to any of its functionaries, is in the people of the State.<sup>6</sup> We often notice, however, the European and Japanese criticism—their constitutional authority, too—that the people consists of those persons who are born in the morning and expire in the evening, and that the people, being the element that constitutes the sovereignty, cannot themselves be called the sovereign, because they lack in permanency and are not a unit. Such criticisms and others along these lines are the signs of ignorance, or at least the signs of a lack of study of the great American institutions from the innermost principles of their existence.

By the Declaration of Independence, "that all men are created equal," and "that governments derive their just powers from the consent of the governed," the inhabitants of the colo-

<sup>5</sup>27 Sup. Ct. Rep. 419.

<sup>6</sup>2 Dall. 471.



nies declared void all former theories of sovereigntyship, and by the same act made the new theory that the sovereignty derives all its just powers from the consent of the individual a political fact, a practical fact, and a legal fact.

In the formation of the American Government those who assumed to act at the Constitutional Convention in framing this greatest of national charters were agents merely, acting in the name of the people. It left their hands an unauthorized proposition to be submitted to the people for assent and ratification, neither published nor prescribed. The people acted upon it in the only manner in which such a subject could be safely and effectively acted upon. From these ratifying conventions the Constitution derives its whole authority. In the language of Chief Justice Marshall, "government proceeds directly from the people; is ordained and established in the name of the people; and is declared to be ordained in order to form a more perfect Union, establish justice, insure domestic tranquillity, and secure the blessings of liberty to themselves and to their posterity."

The assent of the States in their sovereign capacity was implied in calling a convention and thus submitting that charter to the people. But the people were at perfect liberty to accept or reject the instrument presented to them; though, having once made their decision, the act was final. It neither required the affirmation of the States nor could it be negatived by the State governments. The Constitution when thus adopted was of complete obligation and bound the State sovereignties. It has been urged that the people had already surrendered their powers to the State sovereignties and had nothing more to give. But surely the question whether they may resume and modify the powers granted to government does not remain to be settled in the United States. Much more might the legitimacy of the general Government be doubted had it been created by the States.

The powers delegated to the State sovereignties were to be exercised by themselves, not by a distinct and independent sovereignty elected by themselves. In the formation of a league, such as the Confederation, the State sovereignty was complete. But when it was deemed necessary to change the alliance into an effective government, possessing great and sovereign powers, and acting directly on the people's authority, the necessity of referring it to the people, and of receiving the powers directly from them, was felt and acknowledged by all. "The Government of the Union," in the language of the Supreme Court, "is, then, emphatically and truly a government of the people. In form and substance it emanates from them. Its powers are granted by them, and are to be exercised directly on them and for their benefit."

## CHAPTER II

### THE GOVERNMENT

WE have observed the glimmering light cast on the American system of government, as conceived by the Fathers of this country, and adopted and preserved by the American patriots, and by them believed to be the nearest approach to perfection in the form of human government. We have sounded the keynote of our further investigation in that the American people are, from every point of view, sovereign, omnipotent, and that they can do no wrong. Let us now proceed a step towards proving the strength, beauty, and immortality of the republic—the only real republic the world has ever begotten.

When the right of government is vested in a single person, or in a body, the public functions start and end in them, so that the distribution of public functions is not an essential factor. Consequently, we note the statement, in the words of Ito, "The judicature is combined in the sovereign power of the Emperor as a part of his executive power," and even according to such an authority as Bagehot, the theory of "checks and balances" has been broken down in England, and the English Constitution now embodies a "close union, a nearly complete fusion."

With Americans, the nature of government itself demands a practical demonstration of the theory of the distribution of public functions. But we admit that the division of the public

functions—executive, legislative, and judicial—did not originate in the United States, but existed in England at the time of the American Revolution. While this is admitted, it is due the American Constitution to say that with it did originate the proposition to separate the several branches of the Government, and yet preserve a co-ordination and interdependence between them, a design unique and apparently differing from the Government of Great Britain. This legal, practical, and fundamental division of powers, which other countries have entirely failed to grasp and now condemn, has thoroughly succeeded in this country during the time the Constitution has been in force.

This separation of the powers of government is being followed, without doubt, in the Continental countries, especially in France, but the practical working of their system is dissimilar to that of the United States. As interpreted by French history, French legislation, and the French judicial decisions, their idea of the separation of powers may be given in this example. The French seem to include the whole principle in this, that the judges are not removable; by which they mean the independence of the judicial power; and the executive or legislative officials are also independent, whether their acts be illegal and unconstitutional or not, thus placing them beyond reach of the courts; by which they mean the independence of the executive or legislative powers. This idea seems to us the offspring of a double misconception. In the expression of Dicey, "Montesquieu was misunderstood on this point; his doctrine was, in turn, if not misunderstood, exaggerated and misapplied by the French statesmen of the Revolution, whose judgment was biased, at once by knowledge of the inconvenience which has resulted from the interference of the French 'Parliament' in matters of state, and by the characteristic and traditional desire to increase the force of the central Government."

To this must be added a further consideration of the indefinite class of "administrative acts," or acts done by government officials, whether under the police power or on grounds of public policy or public security; acts which, in the eyes of the French statesmen, it seems to us, are, like the prerogatives of despots, inviolable, immutable, and unpunishable by the law of the land. Take, for instance, the case of extradition, where a foreigner, powerless and friendless, is to be extradited, the law concerning which is made by the legislative power. There the executive power has a free hand over the judicial power, and often the executive power can be exercised even without the legislative sanction. It makes no difference whether the detention for such extradition, or the issuing of process for such extradition, by the executive department, is illegal or unconstitutional, the foreigner has no recourse to the courts of justice for the protection of his rights. The judicial arm of the Government is a useless thing to foreigners.

When a question arises in the United States as to acts done between officials and private citizens, native and alien alike, the official persons have no more, nor any right other than the rights of an ordinary person. The American court, as the judicial arm of the Government, at the moment when it finds any person whose written or unwritten right is being infringed upon, interferes, and either by writ of *habeas corpus*, *mandamus*, or injunction takes charge of the parties concerned; and the whole nation, at the back of the court's bidding, jealously watches the proceeding as a justification of that government of law which the American Government is entitled to the proud distinction of being. Coxe emphasizes this point when he said: "In the Continental States of Europe the courts of law have not, as a rule, the power to decide upon the legality or illegality of the administrative acts of executive officials. Such questions seem

to be regarded as matters of public right, and so properly withheld from the courts, whose jurisdiction over civil rights should not extend beyond private right. It can hardly be denied that the American lawyer, who holds that judicial courts are competent to decide questioned laws to be constitutional or unconstitutional, presupposes that the same courts are competent to decide questioned executive acts to be legal or illegal. Indeed, it is safe to assert that every American must ponder long before he can understand how a judiciary which cannot question an executive act can question an act of legislation."

The classification of the powers of government in the United States, with its peculiar delicacies, has been well established. We will simply say in the fewest words that the legislative power is the authority to make the laws and to alter them at discretion; the executive is the power to see that the laws are duly executed; and the judicial is the power to construe and apply the law when controversies arise relative to what has been done or left undone under the Constitution. Legislative power, according to the American legal rendering, deals in great measure with the future, and executive power with the present, while judicial authority is retrospective, its province being to deal with acts accomplished or threatened, promises made and injuries suffered. There can be no more clear exposition of this than the opinion given by the Supreme Court of the United States that the difference between the departments undoubtedly is that the legislative makes, the executive executes, and the judiciary construes the law, but the maker of the law may commit something to the discretion of the other departments.<sup>1</sup>

Little analogy exists between the matter of derivation of the powers and rights of the British Parliament and of the American Congress. While a seeming likeness prevails in that

<sup>1</sup>10 Wheat. 1.



each Government possesses a higher and lower house—in England the “House of Lords and the House of Commons,” and in the United States the “Senate and the House of Representatives”—there the similarity ceases. They are opposite in nature and degree to such an extent that Mr. Justice Harlan said: “In view of the essential difference between the American and English governments in respect of the source and depositories of power, the decisions of the English courts on this subject were entitled to but little credit.”<sup>2</sup>

With the cursory glance we have given to the distribution of the powers of government in the United States and Great Britain, and with a warning to impress upon our memory the paradoxical, yet fundamental difference underlying the respective workings of the principle, a difference which it is necessary to keep in view, we may pursue our reflections with some degree of continuity and perspicuity.

Having thus “arranged” our mind, we will advance a step further and endeavor to present a comprehensive idea of the arrangement of the legislative powers of the governments of Europe and Asia. Taking Great Britain as the first exponent of these functions, we observe that there is no legal distinction between Parliament and the people at large, for the reason that the rights and powers of the people in their entirety are vested in Parliament, just as though the people were bodily present in the chamber in which this, their authority, sits. Practically, the British Parliament is the depository of the authority of the nation, and is therefore omnipotent. Next in order we will consider the German theory. It is an indisputable fact that the Bundesrath, which is the Federal Council, the members of which are appointed by the princes of the several States, is all-powerful in the regulation and determination of the matters

of chiefest concern, affairs of the utmost importance and bearing directly on the well-being of the people. These remain in their provinces, and their decisions are autocratic, while the Reichstag, which is the assembly of universal suffrage and would naturally seem to be in more immediate touch with the people, has comparatively little authority, and carries relatively no weight in these affairs of utmost importance in the life of the German States. The republican form of government in France is interesting as presenting a thoroughly unusual constitutional theory, in that the Senate, which is a creature of the municipal delegates, can unite and authorize, if need be, the executive department of the Government to dissolve the Chamber of Deputies; albeit this latter is created directly by election of the people, and represents, from the constitutional point of view, the expressed will of the people.

The Japanese form of government next claims our attention. The Imperial Diet has no place whatsoever in the sovereign power. True, it takes part in legislation, and also has the right to deliberate on laws, but no power to determine them. The Japanese compiler of the Imperial Constitution asserts that this assembly has the certain responsibility of maintaining a strict supervision over the administration of the laws, and declares that this bestows upon the Diet a certain amount of power. We, who claim the right of professional criticism, concede this, but insist at the same time that such power is merely indirect. This opinion is confirmed by the following exposition of the unique position occupied by the Imperial Diet: "This assembly was created to form a usual adjunct to the political machinery for the sake of a constitutional government." Where in the great charter of Japanese liberty can it be found that the legislative power is the original authority, or that its voice is omnipotent in affairs, as we find in the Government of Great Britain?



Neither does it possess the delegated authority or inherent right to order and direct all that must be accomplished within the orbit of the legislative department of government as we find in the United States. By comparison with the powers bestowed upon the legislative assemblies in Great Britain or the United States, we can but see that all the legislative powers of Japan, fundamentally and practically, though by no means theoretically, are vested and remain in that most exalted personage, His Majesty the Emperor of Japan, the Creator of the Imperial Constitution, the Source and Fountain-head of all the political life of Great Japan herself.

When all the powers of sovereignty are exercised by a single person, who can, if he desire, exert an arbitrary authority in the affairs of the State, as instanced in Japan, and in Germany in the case of the Emperor and princes, or even as in Great Britain, when vested in a number of persons, who alone hold the power to make laws, to determine their violation, or to hear complaints of the violation of the same, and in whom also resides the right and responsibility of the execution of the laws, we assert that under these conditions the question of a distribution of powers can have a merely theoretical importance, for the obvious reason that nothing of moment concerning the welfare or happiness of the people depends upon such distribution. Inasmuch, therefore, as under conditions such as these, with powers concentrated and focused as we have shown, an arbitrary government results almost of necessity; and, moreover, as wide latitude exists for the exercise of caprice or passion in the dictates of political affairs, it is evident that human nature can be, and often is, as readily swayed by these emotions as by reason and justice. Given this undue power, might, and not right, frequently controls the trend of national affairs, to the

undoing both of the well-being of the people and the greatness and purity of the government.

From the experience thus gathered there has arisen in political science a maxim that, to insure property and the due recognition and protection of rights, the powers of government must be classified according to their nature, and each class entrusted with the administration of a different department of the government and to be held absolutely responsible for the peculiar class of power allotted to it; moreover, the exercise of the certain powers held by each department gives not only a peculiar independence individually, but acts as a restraint upon the others, making it possible to establish and enforce a guarantee against one department encroaching on the powers of another. Should there appear a tendency to such infringement, each acts as a balance wheel to the other. It is only by the American people that the cherished theory of the perfect government, as dreamed by the political philosophers of ancient times, has been put to a practical test and has come out triumphant. This theory Aristotle describes thus: "In every form of government there are three departments, and in every form the wise law-giver must consider what, in respect to each of these, is for its interest. If all is well with these, all must needs be well with it, and the differences between forms of government are differences in respect to these. Of these three, one is the part which deliberates about public affairs; the second is that which has to do with the offices; and the third is the judicial part."

It is an admitted fact that the theory of dividing the powers of government has been systematized in the growth of the English nation. While the Continental nations were misapplying and exaggerating the principle, England went its own way, and now, almost reaching the opposite extreme, has developed the new theory, the government of Parliament. That the American

people are alone successful we can readily observe is due to the genius of the people who invented the necessary processes which are fitted to carry out to perfection the theory of the separation of powers. By this we mean the "checks and balances system" of the American Government—a system which is at present, and will continue to be, the best one in bringing out human government as perfectly as human minds can conceive. To enumerate the checks and balances of the Government, we borrow the language of one of the inventors, John Adams: "First, the States are balanced against the general Government. Second, the House of Representatives is balanced against the Senate, and the Senate against the House. Third, the Executive authority is in some degree balanced against the Legislature. Fourth, the Judiciary is balanced against the Legislature, the Executive, and the State governments. Fifth, the Senate is balanced against the President in all appointments to offices and in all treaties. Sixth, the people hold in their own hands the balance against their own representatives by periodical elections. Seventh, the Legislatures of the several States are balanced against the Senate by sexennial elections." And whatever the incidental questions or complications which have arisen with reference to the working of the system, the people have stepped in and, like the hurricane, wiped away such dissension and cleansed the foreground. The people of the United States do not stand aside and leave such questions to rulers, as some peoples of European and Asiatic countries do. Contrary to the course of the people who look either to Parliament or to the emperors for the whole adjustment of matters and expect from them an exposition and settlement of all national affairs, the American people stand well forward, express their opinion of the adjustment of differences, and set their seal upon the final disposition of any dissension.

## CHAPTER III

### CHARACTERISTICS OF THE GOVERNMENT

THE American people, when they adopted the Constitution, imposed very effective restraints on the power of the States. They have by their expressed wish restrained the States from exercising the vital powers of the United States. Nothing was left undone to provide against encroachment upon the Federal jurisdiction. On the other hand, there are reserved under the Constitution several ways in which the States are expected to constitute checks and balances on the powers of the Federal Government. The people made it plain that all matters relating to the family and the domestic relations, the administration and distribution of estates, the forms of contracts and conveyances, the maintenance of peace and order in the States, the punishment of common law offenses, the making provision for education, for public highways, for protection of personal liberty and liberty of worship, were to be reserved to the States, and that the Federal Government has no jurisdiction over the same. The American people are confident that the constitutional checks in their governmental system are sufficient for the future, as they have been for the past. They are confident that so long as the "plumb-line" of the Constitution is kept as their guide, they are safe to rear whatever superstructure is needed to comply with the requirements of the ever-advancing age. "Let us," says Mr. Justice Harlan, "then, move on in the 'old path,' where is the good way, marked

out by the fathers. Let us not give our approval to any interpretation of the Constitution that will either cripple the nation's power and prostrate the Union at the feet of the States, or that will deprive the States of their just powers. Let us hold fast to the broad and liberal, and yet safe rules of constitutional construction approved by judicial decisions. In so doing we will sustain our dual system, under which the Government of the Union is forbidden to exercise any power not granted to it expressly or by necessary implication, while the States will not be hindered or fettered in the exercise of powers which have not been surrendered to the Union and are not inconsistent with the Constitution."

The American progress and prosperity are written along the lines of demarkation between the powers of the States and Union. Ever since the Constitution was put forward, the people's lives were focused in the guardianship of their institutions against insidious attacks upon their fundamental principles, the ideal working of the system of checks and balances, and also against the exercise of arbitrary or usurped power. In England, in Germany, or in Japan the officials of the Government or a certain class of the people are striving for a solution of the national, political, or domestic economic or social problems; these men are endeavoring to cope with the rising tendency of the age. Contrast this with the characteristics of the Americans, who approach these problems as if each individual held an interest and had a direct responsibility in solving the momentous questions of the Government and of the nation. It goes without saying that these people must love liberty and equality more than other nationalities, for the simple reason that by so doing they can more safely enter into competition among themselves in their onward march to the realization of the destiny of their peculiar government.



The liberty they love is the liberty that gives a right to protect one from injury by another; any one has the right to prevent an injury or injustice that may be meted out to a weaker or more ignorant person. The liberty they love is the liberty which allows them to freely participate in the making of the laws. Whenever their liberty is in question, there is in every instance judicial proceedings; and that requirement implies an accusation, a hearing before an impartial tribunal with proper jurisdiction, and a conviction and judgment before punishment can be inflicted. The equality they love is the equality which bestows on every person, however low, degraded, or poor, the right to be judged by the same laws which govern others. A person may be of high estate, wealth, rank, power, but all in vain—the same law is used for all ranks and is decided irrespective of class or condition.

The American people oppose with decision, because they conceive it to be a false theory, that practice of equality which, in effect, says that a state of nature prevails, in which every man has a right to what he can take; that the time has come for the rich to make way for the poor. The American will have none of that, and recognizes such theories and practices to be the outcome of radical socialism or anarchy, and would result in constituting a government by mob and in the destruction of true liberty and equality. The Americans also do not approve of or endorse the underlying sentiment of socialism or anarchy. MacDonald rightly said: "Just as an epidemic strikes the poorest and most filthy places, so anarchy develops and becomes bold in countries badly governed."<sup>1</sup>

They do not approve of economic equality, because their Government is a government under the reign of law, and the end of it is justice; and justice begets liberty, and liberty denies

<sup>1</sup>Albany L. Jour. Vol. 69.

economic equality. There never has been and never will be an equality of ability, of efficiency, or of physical fitness. The idea of economic or physical equality is absurd and monstrous, as well as unnatural. And the unnatural is never long-lived, nor does it carry any weight or influence, for it lacks the essential element of reason, and without reason there is no law. The government not of law is not a government within the meaning of the modern State. The American liberty and equality is expressly provided for by the Constitution and laws. Be he citizen or alien, all persons in the United States are protected by these provisions, and the word "person" is held by the Supreme Court "to embrace resident alien and the corporation."<sup>2</sup>

We will now proceed a step or two further into the matter of constitutional construction and will find how liberty and equality are understood by the American people. For the sake of argument, let us, therefore, confront ourselves with some of the most jealously guarded and most frequently construed portions of American liberty and equality.

Religious liberty is guaranteed everywhere throughout the United States, and the Constitutions of the States and nation provide for it. But they do not define the word "religion." The American people go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, they think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is: What is the religious freedom which has been guaranteed? Before the adoption of the Constitution, attempts were made in some of the Colonies and States to legislate, not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The citizens were taxed against their will for the support of religion, and sometimes for the support of particular

<sup>2</sup>125 U. S. 181.

sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates<sup>3</sup> of that State, having under consideration "A bill establishing provisions for teachers of the Christian religion," postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested to signify their opinion respecting the adoption of such a bill at the next session of the Assembly. This brought out a determined opposition. Among others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. At the next session the proposed bill was not only defeated, but another, drafted by Mr. Jefferson, "for establishing religious freedom," was adopted.<sup>4</sup> In the preamble of this act religious freedom is defined, and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty." It declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and order." In these two sentences, the American people think, is found the true distinction between what properly belongs to

<sup>3</sup>An American State legislature always consists of two Houses, the Upper House called the Senate, the Lower usually called the House of Representatives, though in a few States it is entitled "The House of Delegates," and in six States, "The Assembly."

<sup>4</sup>Jeff. Works, 45; 2 Howison, His. of Va. 298; Semple's Va. Bap. App.



the Church and what to the State. In little more than a year after the passage of this statute the convention met which prepared the Federal Constitution. Although the Constitution did not provide in express terms for freedom of religion, the first session of the first Congress proposed the amendment, which was adopted by the people of the United States, that "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof."<sup>5</sup> It was the same Mr. Madison who advanced religious liberty in the Virginia Assembly as it was who advocated it in Congress. And it was the same Mr. Jefferson who was the acknowledged leader of the advocates of the measure in Virginia who later advocated the passage of the above amendment. The American people, therefore, accept as the scope and effect of this constitutional guarantee what Mr. Jefferson, replying to an address, says: "Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the Government reach actions only, and not opinions—I contemplate with sovereign reverence that act of the whole American people which declared that their Legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between Church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced that he has no natural right in opposition to his social duties."<sup>6</sup> The American people from that day to the present have never swerved from this understanding of the subject we are discussing.

<sup>5</sup>Amend. of U. S. Const. Art. 1.

<sup>6</sup>Jeff. Works, 79; 98 U. S. 145.

The provisions against unreasonable searches and seizures in the Constitution are regarded by the American people as one of the permanent monuments of American liberty and equality, and are quoted as such by the authorities from the time of making the Constitution to the present time. In order to ascertain what is intended by the terms in the Constitution, "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures,"<sup>7</sup> the American people think it is only necessary to recall the early controversies on the subject. Therefore, we recall a decisive case in which a decisive jurist, Mr. Justice Bradley, rendered a decisive opinion of the Supreme Court. "The practice," said the jurist, "had obtained in the Colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods, which James Otis pronounced 'the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental principles of law that ever was found in an English law-book,' since they placed 'the liberty of every man in the hands of every petty officer.' This was in February, 1761, in Boston, and the famous debate in which it occurred was perhaps the most prominent event which inaugurated the resistance of the Colonies to the oppression of the mother country."<sup>8</sup> "Then and there," according to John Adams, "was the first scene of the first act of opposition to the arbitrary claims of Great Britain. Then and there the child Independence was born." At the moment such practices appear in their land of liberty, in that moment the Americans will be ready to crush and sweep away the evil. They are ready now, and will continue to be ready.

Equal protection of life, liberty, and property by the law in the eyes of the Americans stands aloft as their most enduring

<sup>7</sup>Amend. of U. S. Const. Art. 4.

<sup>8</sup>116 U. S. 616.

monument. Therefore we see in the Constitution this provision: "Nor shall any State deprive any person of life, liberty, and property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law."<sup>9</sup> In construing this provision the people have shown it to be universal in its application to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the law is a pledge of the protection of equal laws. When they consider the nature and the theory of their institutions of government, the principles upon which they are supposed to rest, and review the history of their development, the people are constrained to conclude that they will not leave room for the play and action of purely personal and arbitrary power. Some foreign authorities say that sovereignty itself is, of course, not subject to law, for it is the author and source of law; but in the American system sovereignty itself remains with the people, by whom and for whom all government exists and acts. And the law is the definition and limitation of power. The American people believe that it is, indeed, quite true that there must always be lodged somewhere, and in some person or body, the authority of final decision; and in many cases of mere administration the responsibility is purely political, there being no appeal except to the ultimate tribunal of public judgment, which is exercised either through the pressure of public opinion or by means of the suffrage. But they also believe that the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments of the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws. In the language of Mr. Justice Matthews,

<sup>9</sup>Amend. of U. S. Const. Art. 14.

"So that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' For the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life at the mere will of another seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself."<sup>10</sup>

A "republican form of government," as guaranteed to the States of the Union by Article IV, Section 4, of the Constitution of the Union, is itself guaranteed, like as by a guardian angel, thus insuring the utility of the Union and providing against the evils and dangers to which every free institution will be incidentally exposed. It is this guaranty of a republican form of government that has made the people of the States uniformly one people, as if that were the design of Providence. Each citizen enjoys the same rights, privileges, and the equal protection of the laws, and all the people unite in making peace and war, and as a nation vanquish their common enemies. What, then, are the distinctive characteristics of a republican form of government? To answer this question it serves the purpose better for us to go back to the very time when this form of government was in process of adoption by the American people. It is still better for us to answer the question in the language of Mr. Madison, one of the strongest champions of republicanism. "Were an answer to this question to be sought," says Mr. Madison, "not by recurring to principles, but in the application of the term by the political writers to the Constitutions of the different States, no satisfactory one would ever be found. Holland, in which no particle of the supreme authority is derived from the people, has passed almost universally under

<sup>10</sup>118 U. S. 356.

the denomination of a republic. The same title has been bestowed on Venice, where absolute power over the great body of the people is exercised in the most absolute manner by a small body of hereditary nobles. Poland, which is a mixture of aristocracy and monarchy in their worst forms, has been dignified with the same appellation. The Government of England, which has one republican branch only, combined with an hereditary aristocracy and monarchy, has, with equal impropriety, been frequently placed in the list of republics. These examples, which are nearly as dissimilar to each other as to a genuine republic, show the extreme inaccuracy with which the term has been used in political disquisitions." Mr. Madison continues: "If we resort, for a criterion, to the different principles on which different forms of government are established, we may define a republic to be—at least may bestow that name on—a government which derives all its power directly or indirectly from the great body of the people, and is administered by persons holding their offices during pleasure, for a limited period, or during good behavior. It is essential to such a government that it be derived from the great body of society, not from an inconsiderable proportion, or a favored class of it; otherwise a handful of tyrannical nobles, exercising their oppressions by a delegation of their powers, might aspire to the rank of republican, and claim for their government the honorable title of republic."<sup>11</sup> In later days, to the same effect, Judge Cooley, after quoting Mr. Madison, said: "The terms of this provision 'presuppose a pre-existing government of the form that is to be guaranteed. As long, therefore, as the existing republican forms are continued by the States they are guaranteed by the Federal Constitution.'" The American people, however, did not define or designate in their Constitution any

<sup>11</sup>*Federalist*, Nos. 39-43.



particular form of government as "the republican form." They do not say that the present is the exact form of government that is to be guaranteed specially by the Constitution. Here, as in other portions of the instrument, we are compelled to search the hidden depths of constitutional construction to ascertain what was intended.

It seems to us, however, that the American people as a whole merely impose the above restriction on the people of the State, and with this remain contented, as if to say: "So long as you do not exchange your republican for an anti-republican Constitution, we believe that we have no right and no business to meddle. We are aware that, however well guarded, there will always be dissensions concerning the abuse of the powers of government, and when such controversies arise you may use your own authority." On the other hand, the people of a State are aware that the Government of the United States, being authorized by the people of all the States, of which people they are but one portion, will interfere and put down any attempt by the people of a State to amend their Constitution so as to set up a monarchy or destroy the republican form of government. The American people do not hesitate one moment to interfere, if by revolutionary action the people of a State set the constitutional authority aside, or attempt to do so, for some form of government other than what is understood as republican. And it is also plain that if by hostile action a foreign power establishes its own government in a State, the American people will in a moment spring to the defense of the republican government of that State, for the simple reason that the foreign government would be established there, not by the expressed will of the people governed, but by a foreign power, irrespective of the recognized existing form of government. "The guaranty," says the Supreme Court of the United States, "neces-

sarily implies a duty on the part of the States themselves to provide such a government. All the States had governments when the Constitution was adopted. In all, the people participated to some extent through their representatives elected in the manner specially provided. These governments the Constitution did not change. They were accepted precisely as they were, and it was the duty of the States to provide them. Thus we have unmistakable evidence of what was republican in form within the meaning of that term as employed in the Constitution."<sup>12</sup>

The guaranty of a republican form of government to the State is, and ever has been, the binding force of the Union. As the result of growth and experience American political life undergoes evolution, but all the more the American people, it seems to us, use this constitutional guaranty as a providential landmark whenever and wherever there appears blind reprobation, as well as blind approbation, of their most peculiar government. They would say: "Our political growth and experience in America has demonstrated the wisdom of those who founded our institutions; and with an amazing transformation of facilities and social condition, we seem not to have changed the essential aims of our political structure, which are those of orderly freedom, of equal opportunity, and of democratic brotherhood upon a high level of intelligence and social well-being."<sup>13</sup>

Should there now, or at any future time, a danger arise to jeopardize in the least the fundamental characteristics of the American Government, or to weaken the Union, the American people would say, as Mr. Jay said, when from a corner of his country a clamor arose against it: "I sincerely wish that it may be clearly foreseen by every good citizen, that whenever

<sup>12</sup>21 Wall. 162.

<sup>13</sup>Albert Shaw, *Political Problems*, 251.

the dissolution of the Union arrives, America will have reason to exclaim in the words of the poet, 'Farewell! A long farewell to all my greatness!' ”<sup>14</sup>

<sup>14</sup>*Federalist*, No. 11.



## CHAPTER IV

### AMERICAN SPIRIT

EVERY American—even though he be poor or unfortunate—looks upon the wealth and fortune of the republic as his private interest and strives for its success. He takes upon himself the obligation to uphold the nation in an international or interstate question, and the State in an intrastate problem. The American does this, not because it is his country, but because it is himself that is affected.

There are many ways of discovering the secret that unlocks the American spirit, but to discern it in a country where conditions of equality prevail, we may quickly be enlightened in approaching the relation of master and servant, and of man and woman. Equality of condition evolves new beings in master and servant. When social conditions are nearly equal, those who command are not sure of continuously commanding. Likewise, those who are obeying are not sure of continuously holding such a position. The master, in America, has no more or better opportunities to participate in education or in public opinion than have the servants. We fail to see anywhere that class of beings found in Europe and in Asia, commonly called "servants," with the import that term has in those countries. However, there are persons in America who serve others under the stipulations of contract. If one who thus serves another is a servant, then there are servants in America. His profession, however, be it that of a domestic servant or not, is as honorable

as that of one who does not serve, himself. A domestic servant in America may be as respectable as a person who serves as a member of Congress. A servant may be as honest a man or as big a scoundrel as a member of Congress. In America, one in any profession receives credit for what he does. If he is dishonest, and has a tendency to revert to his ancestral life in the top of a tree the moment the employer is out of sight, or if his character is so base that it tends to produce degeneration of the community, to lower the standard of living of those around him, or in any way to appear antagonistic to the customs of society, he must suffer the consequences, be he Negro or Chinese. For that matter, even Japanese, Italians, Greeks, or any other nationality would meet the same fate in America. It is honorable for the servant to keep the contract to serve and to obey, and for the master to hold the contract, by which alone he has the power to be served—each knowing the other's situation. Such a relation seems to be more consistent than where one serves the other, as in some countries of Europe or Asia, in blindness, ignorance, and insensibility, in perpetual obedience and often by self-sacrifice. The American boy, on coming of age, proclaims, as did Kaiser Wilhelm II when he ascended the throne: "To my people, I gather the confidence that God will lend me strength and wisdom to fill my royal office to the welfare of the fatherland." A foreigner who is traveling in America must be careful in remarking about anybody or anything in America, lest he "run up against" an American prince or princess.

A stranger's own servant is, in this country, an American prince or princess, and may hurt his master's feelings. When Li Hung Chang arrived at the railroad station in Washington as an envoy to carry a personal message from his sovereign to the President of the United States, according to the Chinese

custom a stretcher was prepared to convey this high personage from the depot to the White House. The great Oriental gentleman took his place in the stretcher and told the American man to carry him. The man, looking straight into the face of the Envoy Extraordinary, said: "Mr. Chinaman, you seem to have splendid health, so you must go without the stretcher. In this country, unless one is very sick, and we are consequently imbued with the feeling of humanity, we are not used to carrying a man on a stretcher. Mr. Chinaman, when you see the President, tell him what I said, and, as for yourself, never again while you are on American soil thus insult the dignity of an American man." The Chinese gentleman went without the stretcher, and all America approved the course of the American man.

In mingling with Europeans or Asiatics, we at once notice a peculiar practice—that is, the maintenance of those strange immunities for men; in other words, one standard for man and other standards for the guidance of woman. At the most, in those countries, the woman receives a retired or somewhat cloistral education.<sup>1</sup> In the first place, the Americans believe, by reason of their objective religion, that there is in woman an immortal soul as precious as the soul of man. They also believe that there are certain functions, offices, and glories for which woman is better fitted than man. The Americans, who constitute free institutions, are thus impelled to have more religious enthusiasm, philanthropy, and morality. And, as the groundwork on which free institutions rest, they say that women are born with surpassing genius, virtue, and intelligence. They say that whatever affects the habits, opinions, or the conditions of woman affects the very foundations of social and political

<sup>1</sup>Kenjiro Ume's "Japanese Legal Woman"; Masuji Miyakawa's "Life of Japan."

communities. The American woman, therefore, accepts this high responsibility and holds fast the share of her resulting rights under it. We see everywhere in America young girls struggling to learn to stand upon their own ground, by their own strength of character and under their own guidance. The vices and dangers of society are early discerned by the young American girl. She wants to understand the corruption of the world. The American girls are religious, and virtuous, and moral, but they are not content to be these negatively; they wish to arm themselves for protection by knowing the reasons for morality as well. There are many unmarried men, as there are many unmarried women. These do not marry, and cannot be made to marry, like in some foreign countries where parental authority forces marriage upon their sons and daughters. But if an American girl marries, she is the mistress of her own action. She is not like some European or Oriental girls, bashful, childish, or excited. She is thoroughly prepared for what marriage means, not like the women of some other nationalities who learn its meaning only after marriage. Therefore the American woman is helpful in the ever-varying life, fortunes and misfortunes of man, and she is ready to brave every peril and privation of man with her usual calmness.

To characterize an American, we can find no better expression than the remark by August Bebel, a German Socialist leader, about the German Emperor: "A prince is born a prince. Is it his fault?" Every citizen—though poor and most unfortunate—is born either a prince or princess in America, and he or she will demand their proper privileges and immunities as surely as the Almighty created them after His image.

Thus we see in America that woman enjoys the privileges of a moral being, that is, the privileges of unrestricted action except so far as the corresponding privileges of man necessitate

restriction. However, there is no boldness or effrontery on the part of woman in these privileges, such as superficial travelers or students in America are often prone to report at home. Caucasian manhood, except for the degenerate few, is ruled by the same loyalty to God, woman and honor, though in an evolutionized form, as observed in their knightly ancestors of the middle ages. The American man is a man. This instinct of sex is ever becoming more pronounced in America as civilization advances. Man's first crude manifestations of virile qualities, as well as his final survival in the world-wide battle of competitive existence, he should credit to the instinctive teaching of the other sex. He should credit it in the same way as Napoleon credited his military inclination which was soon to astonish the world, to the teaching of his Corsican mother, or in the same way as Yoritomo, who founded the Feudalism which preserved Japan for over seven hundred years, credited it to his widowed mother, Tokiwa-gozen. It is said that seventy-five per cent. of all the schools of this country are taught by women. When Alice Stone Blackwell of Boston said that "the tendency of woman to admire the military is notorious," it reminds us of the everlasting truth of the woman's power over the child. It reminds us of Cornelia, mother of Tiberius Gracchus. His plebeian ascendancy over the patrician yoke and his becoming tribune, and expounder of the Agrarian laws of Rome, to which the present Russia and English administration owe eternal debts, may be absolutely and solely credited to the training of Cornelia. There can be no difference of opinion in East or West, that the mother of Kusunoki, in the teaching of her fatherless son, has ever since been and ever will be the idol of Japanese knighthood and the shining example for the soldiery of modern Japan. Wonderful is woman's influence with respect to the martial spirit of man!

The same Boston lady we before quoted, writing about a woman-teacher of the Buffalo boys' high school, said: "Whenever you meet her old pupils, they speak of her with enthusiasm, and one of their most frequent sayings is 'she made a man of me.'" Superintendent Stuart of Washington tells the story of a very brave American soldier and says that he "went to school to a woman!" President Schneider of the Chicago Board of Education announced the fact that when the American boy attains the age of adolescence he will look upon his woman-teacher "with the same reverence as upon his mother." All in all, these matters prove, whether in West or East, the God-given adaptability and capability of woman in teaching and training children as wards of the nation.

The American woman-teacher, in the saying of German pedagogists, aims to arouse in children the spirit of "a stronger will and a stouter character," or, like the Japanese mother, is ever watchful that the "spirit of the child revives in the hundreds." The spirit of the American child in the public schools has presented to our study an unusual phenomenon. For instance, a child belonging to the fifth grade in one of the public schools in Washington, D. C., a few months ago, when asked as to who is the next highest to the President in command of the army of the United States, although unable to answer then, a few minutes after recess gave a most definite and authoritative answer. How was the child able to give such an answer? He did what a child in other countries, or even a grown man, would not have been able to do. During the few minutes recess, he ran across the street to the corner grocery store, put a nickel (five cents) in the slot of the telephone, called up the U. S. War Department, and took down the authoritative data. What remarkable presence of mind! This kind of thing, which is



well worthy of imitation by the children of the world, is constantly going on under the woman-teacher in America.

Concerning the American children, what ought to be conspicuously recorded on the first page of American jurisprudence, is the system of orphan's, children's, or juvenile courts. This progress in America has been made not merely by the introduction of a new law or procedure, but by the practical application of the American aim and spirit. The judges of the American juvenile courts act as a parent and not merely as judges. They say that the law is made for the child and not the child for the law. The time has come in this country when there will be no public court of law for the child. One is chosen a juvenile judge because he succeeds in preventing the destruction of the moral sense by the spirit of vengeance or repression, or in reforming those in whom it has been destroyed. "No child under 16 years of age," says Judge Tuthill of Illinois, "should be considered or treated as a criminal." And according to Judge Hurley of the same State, "the child should be treated as a child. Instead of reformation, the thought and idea in the judge's mind should be formation. No child should be punished for the purpose of making an example of him, and he certainly cannot be reformed by punishing him. The parental authority of the State should be exercised instead of the criminal power." "I have often observed," says Judge Stubbs of Indiana, "that if I sat on a high platform behind a high desk, such as we had in our city court, with the boy on the prisoners' bench some distance away, that any words had little effect on him, but if I could get close enough to him to put my hand on his head or shoulders or my arm around him, in nearly every such case I could get his confidence." The theory of "patris potestas" was the prevailing system in Israel, in Babylon, in Rome and

in India. There the father had the right to sell his child into slavery without the child having any claim of exemption.<sup>2</sup>

But to-day the parents' right over the child is only a right to be exercised as the representative of the State. Although of only indirect bearing, it must be said that in America, upon the separation of husband and wife, it is the general principle of the courts to consider the well-being of the child and not the supposed right of either parent, in awarding its custody.<sup>3</sup>

The methods of children's courts, or juvenile courts, as they are termed in some States, differ in different places. In most States the judge is detailed from some other court. In the States of Indiana, Maryland, the District of Columbia, and probably other jurisdictions, the judges exercise their functions as specialists in their work.

Should an unfortunate child be found guilty of crime by evidence beyond reasonable doubt, then we are directed to the essential feature of every juvenile court, in what we call the system of probation and probation officers. The officers' duty is to investigate the case before the trial. If the boy is found guilty, he is placed on probation, watch-care exercised over him until the period of probation is closed. According to C. R. Henderson, "an old proverb runs: 'God could not be everywhere, so He made mothers.' The judge cannot be everywhere, so he must have probation officers." Above all else, when a boy is convicted of crime, the American will keep strict secrecy of his record during probation, during which time even the American newspaper would not publish a word about him. When his probation is over, he is absolutely pardoned. In

<sup>2</sup>L. H. Morgan, *Ancient Society*, pp. 465-6; W. E. Hearn, *The Aryan Household*, p. 92; James Hadley, *Intro. to Roman Law*; Lee, *Hist. Juris*.

<sup>3</sup>See the case of "La Regaloncita," a seven-year-old girl-dancer at the Broadway Theatre, in New York City, reported, 36 *Northeastern Reporter*, 4.



England, in Germany, in France, and in Japan, we know that there prevail so-called child-saving methods, institutions, and organizations.<sup>4</sup> But they are such a special feature and practice in America that other nations may well be benefited by following the American pattern.<sup>5</sup> Most decidedly so may some nation whose judge still insists that justice consists in its clothing and its bearing, that dignity is often impressive, and that the court should therefore sit on a high platform behind a high fence, while beneath him is a boy-prisoner guarded by policemen or detectives. There examination proceeds before a curious audience, and there is often permitted the publication of the facts in the newspapers. Such a procedure, such methods, such a judge, are themselves committing the highest crime! Any nation which tolerates the existence of such methods of justice, however ostensibly it pretends to possess enlightenment and civilization, nevertheless is but semi-civilized and barbarous.

The American people think the title of nobility is most antagonistic to a republican form of government, and an important clause in the Constitution is that clause which says: "No title of nobility shall be granted by the United States," and "No State shall grant any title of nobility."<sup>6</sup> The American people say to the individual citizen that he shall contribute to the prosperity of the country, and shall promote it as a portion of his own interest. They believe that the Constitutional guaranties of the inalienable rights of every man to partake in the affairs of the Government and their responsibility for the rise or fall

<sup>4</sup>Report of Comptroller of Prisons, New South Wales, on Prisons of Europe and America, 1904; Raux, "Nos Jennes De'tenus; Das Preussische Fuerzorgeerziehungsgesetz vom 2 Juli. 1900 C. Von Massow; Kenjiro Ume, Minpo Yogi, Minpo-Kogi; Gijin Okuda, Minpo-Horon; Tomii, Minpo-Genron.

<sup>5</sup>See Social Regis. and So. Activity, published for the Am. Acad. of Political and So. Science, 1902; Children's Courts in the U. S., Samuel J. Burrows; R. R. Perkins, Treatment of Juvenile Delinquents.

<sup>6</sup>U. S. Const., Art. 1, Secs. 9, 10.

of the nation are much greater privileges than those of receiving titles of nobility. Every citizen is born to live and believe that the idea that any one is inferior to any other is a degradation to his manhood, and that a compliance with such differences as titles of nobility naturally allot and create is an unpardonable offense against the happiness of man, whom the Almighty did not create unequal except in virtue and intelligence. The respect and admiration which one American confers upon another depends upon the merit of that other. He would not and could not believe that a title of nobility makes a man distinguished above other men. He believes that a man can enjoy distinction only by the exercise of individual virtue, intelligence, industry, self-direction, initiative, and determination.

No American has exclusive pleasures or amusements from those of his fellow-citizens. The poor and ignorant are freely admitted to the society of the rich, participating equally in their pleasures and amusements. The more an American travels abroad, where officialdom, or the nobles, and the moneyed few treat the poor or titleless common people with a respectful exclusiveness, he becomes all the more grateful, and imbued with patriotism and attachment to his own free institutions. What seems peculiar and odd in the eyes of a stranger in America is that, as a rule, the higher and wealthier an American becomes, the greater becomes his reverence for and obedience to the law; without a murmur he submits to the order of the lowest court, consisting of but the pettiest judge. This tendency is almost the opposite of that in countries other than the United States.

The American is personally interested in enforcing obedience of the whole community to the law, for the natural reason that the law has originated by his own authority. It may appear to a stranger somewhat curious that while each American forms his own opinion by isolated paths struck out by himself

alone, he is able to successfully unite with others on the important affairs of the nation. However, we see nothing curious about it. As soon as we lay bare the basis of free institutions such curiosity will subside. Men whose life, liberty, property, and pursuit of happiness are equally protected by the laws seek the truth for themselves, and so it becomes impossible for them to entertain notions of a prophetic or divine mission in affairs of government. In the countries where the distinctions of men are manufactured by reason of officialdom or titles of nobility it stands to reason that the distinguished class naturally gathers and must gather to itself learning, intelligence, and enlightenment. On the other hand, this tendency, in the nature of things, makes the poor and ignorant poorer and more ignorant. When such differences are created, when one class of men hold in their hands all the secrets of government affairs and other classes of men sink into the position of foreigners to their own institutions, the chasm is gradually opened between men, out of which the spirit of superstition and the belief in political prophets and divine rights appears.

It may be true that the nearer the citizens are drawn to a common level of equality and condition, the less they tend to have a blind faith in one another. The reason is obvious in that the nature of men brings out common resemblances among them. A man feels with pride that his opinion is the equal of any other man's. But this very pride, in turn, creates a feeling of pride and respect for the opinion of the whole public. These very resemblances, in turn, impel him to obey the judgment of many, for the opinion of each and every one of them is just as much entitled to pride and respect as his own. Discovery of the truth of one opinion must yield to a discovery of the truth of the opinion of all and the reason of all. Public opinion

in America, therefore, has a wonderful power, a power of which an imperial or aristocratic nation has never dreamed.

The public opinion of Europe and Asia is the public opinion of the governing class, who govern either by virtue of birth, wealth, or distinguished personality. The public opinion of Germany is reputed to be non-existent, or it is an inspiration of the "Wilhelmstress" which is a part of, and regulated by, the executive department. Although Bismarck and Moltke are gone, public opinion still remains as docile and well-regulated as when those German demigods were ruling and reigning. We concede that the public opinion of England and Japan has a large amount of freedom, also a greater amount of influence than that of other countries in Europe and Asia; yet, we may ask this: Do not the clubs, the official lectures and dinner parties given by the ruling class or by officialdom in those countries affect, in a great degree, the press, and through it public opinion? In America, the opinion of the people is the opinion of the American sovereign, not the opinion voiced by the officials, for theirs is but the opinion of servants.

The public press in America will tear even the Presidential opinion into pieces. This is not such a great absurdity as the minds of some might think. In some despotic nations the king's message is the message of the nation, but he who takes the message of the President of the United States as the message of the nation shows a mistaken idea of the public spirit of America.

In Europe and Asia, where a public officer works more for honor<sup>7</sup> and not for profit, he naturally has prejudices against labor for pay. Where the public officers serve their country with a feeling of elevation above the non-officials, there comes about the desire to enjoy this "honorable poverty," whether the

<sup>7</sup>In monarchies the people will have honour for their object; in republics, virtue; in despotic governments, fear.—Montesquieu, Book iv.

latter despise it or not in the innermost depths of their minds. Such a feeling begets the aristocratic idleness which some Europeans call "retired life," and which the Japanese call "Inkio." How inconsistent it is that they call the idleness or uselessness of such lives honorable! In the United States the notion of labor and of payment for it is presented to the mind of every person as the natural and honest condition of human existence. The older an American becomes the harder he works. The wealthier a man becomes the more industrious he becomes, lest he be despised by all. The Americans are all alike in that every citizen has something in common with every other. No profession is pointed out as more honorable than others. No one is thought dishonorable for laboring or humiliated for being paid, for every one about him is working and being paid. The work of the President of the United States is fundamentally no more honorable than the trade of repairing shoes. The shoemaker is credited for displaying his ability at the window, so is the President credited for showing his faithful performance of the office entrusted by the people. We have been invited during the last year to witness "the Home-Coming" in Baltimore City, when all the scattered sons and daughters of Maryland took the opportunity of revisiting their native State, of which Baltimore is the largest city. What was most attractive to our sight was, not so much the illuminated decorations and processions of brilliantly uniformed officials, but the procession of street-cleaners shouldering their brooms, and to whom the most gorgeously dressed women of Maryland presented beautiful flowers. Those who are accustomed to see such scenes might not be attracted, but to us such scenes give inspiration. It gave us a belief that in America the profession of the street-cleaner is considered as beautiful as the flowers, and that his ugly and insignificant broom-holding duty seems as respectable, honor-



able, and dignified as the more pleasant duty of the gorgeously dressed American ladies who presented them with flowers.

In other countries where inequalities of men are recognized, their citizens are less sensitive to differences in privileges and immunities, but in America, where the rights of one are level with those of another, the slightest difference strikes hard at the breast of every man. He who is born in the midst of equality of conditions, we have observed, is more sensitive than others. The only consolation for him is to strive more than others for the common benefit of men. And for the same reason he becomes more religious, more moral, more associating, and more patriotic.

When we say that the Americans are more religious than other peoples, we wish to confess our utter incomprehension of their idea of the merciful hands and guidance of the Almighty in their national life. We also confess that our field is entirely without any religious discussion, lest we subject ourselves to severe criticism. However, what we intend to say, and do say, is what is plainly admissible from a strictly human point of view. All religions that deserve the name, and exist among men as such, teach that the object of man is higher than earthly pleasures, and at the same time they aim to bring a man closer to his kind. Such teachings and aims are visible among a large number of religions. Be that as it may, we are not without the historical fact that when the political inequality of men was recognized, and religious believers were insensible of the differences in rights, their human weakness and secluded reflections created such an absurd thing as a Divine Agent from among them. Even those Europeans in early days who worshiped only one God, as we now worship Him, had already sunk into idolatry in paying extremely superstitious homage to brothers who were but servants in Christ. The Christian

religion, which was revealed by Providence upon earth to subdue superstition, for centuries was in the same rank as some other religions that appeared to create superstition. The Americans are and must be more religious than other peoples, for the obvious reasons that the republican form of government aims to remove the barriers that separate man from man and to dispense equal laws in the same manner to every man, while it advances to the truth which avoids mere external observation and roots out every idea of subjection to forms repugnant to the organic law, whether that law be political or spiritual.

The Americans are more moral than other peoples, because they feel restless of every and any difference in the rights of man, and because of their vigilance to avoid these differences and to keep their equality, which they love like life itself. And the very prerogatives and immunities they feel also imbue their hearts with the feeling of something in common with each other—a feeling of common weakness and a realization of common dangers. Their very devotion to liberty and equality, therefore, evolves an unwritten code of morals, founded only upon principles of mutual interest, sympathy, and assistance. The more the Americans strive for the condition of equality, the more they become and must become ready to be of service to one another—each being influenced by a reciprocal disposition to oblige the other. The Americans say, as Lyman Abbott says: “The Ten Commandments and the Golden Rule are not revered by being put behind the altar in golden letters to be looked at; they are revered only when they are carried out in practical application to our complex social and industrial life.”<sup>8</sup>

In some countries of Europe and Asia, whenever it becomes necessary to form a new undertaking or enterprise, the founda-

<sup>8</sup>Lyman Abbott, *The Industrial Problem*.



tion of such organization must first emanate from men of fortune, title, or birth. In England, some member of the royal family; in France, the Government; in Japan, some royal peers or the officials of the Government, are first chosen. The idea is to thus make the organization trustworthy. But, to analytical minds, this proposition may be said to amount to a sort of compulsory process upon the powerless multitudes, if not an imposition upon the mind of the multitudes to the effect that their co-operation would be considered honorable. Whether they co-operate or not, the business will be carried on by the powerful and fortunate few at the expense of the powerless and feeble many. But in America, where the condition of equality is almost extreme, the citizens feel a common spirit of sympathy, assistance, and benevolence for the protection of those equal rights which are created by themselves. This American spirit of association is, therefore, a most consistent and mutually beneficial spirit, whether it be manifested in political, social, religious, educational, commercial, or trade affairs. When the Americans associate, they do it simply and purely from the viewpoint of self-defense and with the idea of equal opportunities to all.

One passing from Europe or Asia into the boundaries of the United States is at once struck by a phenomenal difference. The country he has just left is so calm, quiet, and motionless, and the country before him is so bustling and constantly in action, motion, and agitation. He is soon confronted with the question: "Why do the Americans hasten so very much and have so very many wants?" Until he enters the gate of the American idea of "equal privileges to all and special privileges to none," no matter how long he travels in the country or how well he is educated here, he cannot appreciate the true answer to this question. In countries where inequality of rights and privi-

leges is prevalent, naturally the titled or moneyed class entertain the feeling of pain or disdain if they have to participate or sit together with the titleless or poorest in the discussion of political and civil questions. In America the better class of rich and eminent men take pride in, feel thankful for, and take pleasure in the very opportunities for mingling with the poorer classes for the discussion of social or political problems. The more highly cultivated men in America look to be of service to humbler or less educated men, and seek association with them; by so doing they believe that knowledge and intelligence may be disseminated, and general prosperity and equal opportunity extended to all. These are the only sure means whereby their own rights and privileges as citizens may be promoted, that is, in reciprocal ratio with those of others. The poorest and most unfortunate would say that there may be happiness, even without full political rights, where a country abounds in self-sacrifice and heroism, but happier far is the country where the people rule; that fortunate above all are the self-made American men, who are controlling, watching, and defending the Government by their virtue, patriotism, and intelligence. The American citizens, with such a spirit, form their many associations, and these associations, in turn, stimulate the American spirit.

Thus there are various associations in America, which may in a general way be divided into public, quasi-public, and private associations. For the United States, the public association is composed of the President, Judges, Senators, Representatives, Ambassadors, Generals, Admirals, down to Letter-Carriers and others; for the State, Governor, Legislatures, Judges, down to Janitors and Teachers of Schools, and others. Every State, Territory, and municipal city government is composed in the same way. The members of the public associations in

turn associate with the private citizens, and organize what may be called quasi-public associations, such as the Red Cross, Bar Associations, the University, and other societies, either by granting land or subsidies, or by private donations. And every member of these public or quasi-public associations is at the same time invested with a still more important and higher function, that is, to perform faithfully the duty of a private citizen, ever responsible for the effectiveness of the Government and the dignity of his country. With this purpose in view, the Americans associate themselves together and organize very numerous societies, among which private associations, political parties and the newspapers and periodicals are pre-eminent. Every citizen in America is affiliating with some one or more of these associations. As to the American newspaper and periodical, we need to make a few remarks.

It is said by some Europeans and Asiatics that the American newspapers and periodicals, generally speaking, exaggerate the intelligence they publish more than those of their countries. The criticism is entirely wrong. The press in America—even the great metropolitan dailies whose headings occupy as much as half an entire page—do not exaggerate. Generally speaking, the American press is more powerful than that in other countries. Here, an average reader reads the articles; there, the article reads the reader; here, the reader passes his judgment upon the accuracy and sincerity of the statement; there, the reader accepts the article as a true statement. The more equality of men and women prevails, the more intelligent, independent, and responsible do they become, so that they form their own judgments and stand firmly upon the truth which is discovered by themselves. In America, where equality of condition exists in the extreme, the newspapers and periodicals cannot exaggerate. But an American citizen recognizes his own

opinion as the truth, just as he recognizes the truth of another's opinion. Until he is brought face to face with the truth of the public opinion, then, and not until then, will he bow. The newspapers and periodicals, in a panoramic way, represent the public opinion, and address their readers in the name and in behalf of that united opinion. Therefore, the press in America, practically speaking, and appreciating, as we do, the higher intelligence of the average American reader, is and must be less exaggerating than the least exaggerating press of other countries, but, at the same time, it is and must be very much more powerful than that of the others. The American journalists, as well as the leaders in politics, are not angels, as are those of other countries; they are fallible. But, as we have said, practically speaking, they have ever been and are now demonstrating the possibility of developing men from the lower into the higher ideals of life. We should say of journalists, "out of aims which are bounded by self-interest, and into those which are inspired by loyalty to their fellows and regulated by the sentiments and conscience of the communities as a whole."<sup>9</sup> The journalists in some foreign countries are the critics, from a safe distance, of the actual struggles and strifes of the working world. But the American journalists are like the instructors in the universities, who are "active participants in all the fundamental, progressive work of modern society."<sup>10</sup> In the enlightened and self-directing communities of America they are the guiding stars of justice and civilization. Thus viewed, the journalists, the politicians, the professors in the universities and the schools, working side by side, constitute one vast faculty of educational force, acting like a ray of the sun, radiating warmth, brightness, pleasantness, and cheerfulness in the hearts

<sup>9</sup>President Hadley of Yale, *The College to the Church*, 73.

<sup>10</sup>President Eliot of Harvard, *Add. Columbia Univ.*

of the Americans. And of these we would say, "We come back to the conception which Mazzini had of democracy: 'The progress of all through all, under the leadership of the best and wisest, will elevate them to posts of leadership and command. Under the operation of the law of liberty, it will provide itself with real leaders, not limited by rank, or birth, or wealth, or circumstance, but opening the way for each individual to rise to the place of honor and influence by the expression of his own best and highest self.'"<sup>11</sup>

There are forty-six States in the Union, each divided into counties, townships, and cities, aggregating 65,000 independent local governments. Every citizen in each of these lesser localities exercises his privileges and immunities, and exerts his best and utmost efforts to justify his being an American citizen, while also exercising his rights in the same way in the State and in the United States governments. Putting all this together, there is revealed before the eyes of every American the greatest university, where the art and science of politics and civilization is being taught, having an enrollment of nearly eighty million students.

There are about four or five centres of the press in America, from which radiate all the foreign and national news which is published for the perusal of the citizens who control these 65,000 independent local governments in addition to the State and the national governments. At the breakfast-table, 80,000,000 inhabitants discuss what has not been discussed at the dinner-table of the previous evening. The newspapers and periodicals address to each and every reader a discussion of both sides of local, State, and national questions. The voice that sounds in Washington, New York, or Boston will echo and re-echo in the canyons of the Sierra mountains or the Yosemite

<sup>11</sup>President Butler of Columbia, Lec. Cal. Univ. '07.



Valley; whatever interests the captains of industry and the workmen in San Francisco, Seattle, Portland, St. Paul, or Galveston surely interests the same class in Boston, New York, Philadelphia, Chicago, or Pittsburg. Day in and day out, the American citizens, by reason of their special system of government, learn lessons of justice, humanity, and civilization. Every citizen, by mathematical count of election days, knows that he is given the opportunity, on nearly thirteen days in every year, to apply his own judgment to the questions of government: for instance, whether or not he shall raise the salaries of the school janitors and teachers; whether or not he shall give more salary to the President and letter-carriers; whether the gas and electrical companies shall have to lower their rates; or whether the police judges shall be elected or have life tenure. What are the real elements of conflict when two distinct races come in contact? Shall the tariff be raised or lowered? How do the railroads pool their interests to destroy competition? How must the railroads be controlled so as to serve as a common carrier for manufacturers and farmers alike? Do the Americans want free competition? What is the importance in economizing the national resources? Shall there be an income and inheritance tax on swollen fortunes? If a poor man is entitled to keep every cent he earns, is a rich man entitled to keep every cent he earns? By the initiative and referendum, can all be compelled to submission? These are some of the questions discussed and decided by the American citizen.

How majestic and dignified it is that with their personal, voluntary interest the eighty million citizens enter the school of politics for the study of the problems of human civilization! Never before in the history of mankind has the highway been so clear for American advance and glory! Solon summed up the history of many people when, in answer to the question

whether he had given the Athenians the best of laws, he said: "The best they were capable of receiving!" Even England, to whom the Americans owe the beginning of the division of the powers of government, with her marked distinctions of rank and divided classes, could not entrust her administration to popular control without inviting discord and probable disintegration. The Americans have no antagonism of rank or caste, no patent of nobility save that of merit; and the republic has no distinction that may not be won by the humblest of her citizens. The Americans have had, like all other nations, illustrious patriots, statesmen, and leaders, but they have not been deified. Nor do these need triumphal arches, or towering columns, or magnificent temples to commemorate their achievements—they ask for nothing save the contemplation of the power and safety of the Government of the people. The end and aim of the republican form of government is to illumine constitutional freedom in all its beneficence, power, and grandeur. That American ideals are successful is shown by the fact that the country has grown from a few feeble States east of the Ohio wilderness to a vast continent of Commonwealths, each of which in average greatness equals every nation in the world, and containing in all eighty millions of population. America has made freedom as universal as its authority within its vast possessions. But its influence has not been limited to its boundaries. The whole world has felt its power. By its influence, Europe and Asia have been affected from centre to circumference. The pride of the American spirit has no parallel, and as a result the "god of day sets not upon the boundless triumphs of the American people."



PART II

CONGRESS



## CHAPTER V

### CONGRESS

All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and a House of Representatives.—*Article 1, Section 1, U. S. Constitution.*

THE halls in which the Senate and the House of Representatives hold their deliberations occupy, respectively, the right and the left wings of the Capitol building. The position of the Capitol is imposing, enhancing the architectural splendor of the magnificent edifice, making it appear to be overlooking the city with calm dignity, as if directing it also by the power within its walls. It faces directly upon the main highway of Washington.

Washington, as the capital of the nation, is as important, politically, to the United States as London to Great Britain, Paris to France, Tokio to Japan, or Berlin to Germany. It is more familiarly known to the world, even in the most obscure hamlet in distant lands, than older cities, such as Copenhagen, Stockholm, Brussels, Lisbon, and Berne, although the population of the American capital city does not exceed 300,000, less than that of any of those mentioned above. It is the opinion of many travelers that Washington is more beautiful, healthful, and well-ordered than any other capital city. The feeling is general in Washington that to destroy its picturesque beauty and cleanliness, or to defile the purity of the city, would be an offense unpardonable. The sentiment of the inhabitants is that

if any tradesmen feel hampered by the laws that enforce cleanliness, they should seek their fortunes elsewhere.

For obvious reasons, there is no such difference in the political complexion of the Senate and the House of Representatives as usually exists in Europe and Asia between the upper and lower house. In those countries the upper house represents wealth, aristocracy, and the influence of the crown, while the lower house is composed of the representatives of the multitude. In America, members of both houses come from the same people, are under the same social influence, and return whence they came when their term of office has expired. In theory and practice they are the representatives of the people, governing for the people, and elected by the people. The first House of Representatives met in 1789, and consisted of sixty-five members; at that time the allotment was one representative to every 30,000 of the population. Since then the rapid increase of the population, together with the admission into the Union of new States, has made necessary a change in the basis of representation. The House now consists of 391 members. The Senate in its inception numbered 26; to-day it stands a body of 92. Here we call attention to the representation per capita in the United States, compared to that of other nations. The number of the United States House of Representatives stood at 384 against a population, by the census of 1900, of 75,559,258;<sup>1</sup> while in Great Britain the lower house stands at 670 against a population of 43,500,000.<sup>2</sup> In Japan there are 379 representatives for 48,000,000 of population.<sup>3</sup> Germany gives us 397 representatives to 56,400,000 of people, while France shows

<sup>1</sup>Indian Territory, Alaska, Hawaii and outlying possessions excepted.

<sup>2</sup>Australia, Canada, India, South Africa and the Strait Settlements excepted.

<sup>3</sup>Formosa, Sakalin, Lio Tung Peninsula and Korea excepted.

580 members of the lower house for 39,000,000 population, and the Deputies of the Italian lower house number 508 for a population of 35,000,000. As to the Senate or upper house of the various countries, we see that the Japanese House of Peers has 362 members, as against the 92 of the United States Senate. The English House of Lords is a solid body of 622, as against 300 in the French Senate, while we behold the German Bundesrath with 58 members, as against 300 in the Italian upper house.

The election of the members of the House of Representatives of the United States takes place every two years.<sup>4</sup> This arrangement is entirely agreeable to the people, making it possible for them to anticipate their own wishes in a measure, especially if the Presidential policy should prove antagonistic to their desires. This two-year succession acts as a balance against the President's four-year administration, in event of the President's departing from the way in which he should walk, or of marking out a policy perhaps not fully in accordance with the will of the people. The wisdom, value, and strength of this election law are thus readily seen.

We observe, at this stage of our study of constitutional government, that the House of Representatives of the United States differs fundamentally from the English House of Commons, the German Reichstag, the French Chamber of Deputies, and the Imperial House of Representatives of Japan. Should

<sup>4</sup>A member of the House of Representatives is generally called a Congressman. If a member of one of the two branches of Congress is rightly called a Congressman, a member of the Senate should also be called a Congressman, which, however, is not the case. In theory, therefore, it is right to call a Senator a Congressman, but it seems to be settled as it is by custom. If a member of the Senate is called a Senator, a member of the House of Representatives should be called a Representative, and Congressman, if used as M.P. is used in the English Parliament, should apply to Senators as well as to Representatives, using for both the abbreviation M.C.

any student desire to be informed of the nature of the United States House of Representatives, he must put aside all the knowledge he may have gathered of any other system of representative government. This is absolutely necessary, because a slight acquaintance with other representative systems is apt to be misleading.

The "House," so called in abbreviation of the House of Representatives, provides no seat for the executive branch of the Government and permits no participation by it in debate. The House is also prohibited any voice in the deliberations of the executive branch, unlike the English House of Commons, which is inseparably connected with the King and the lords temporal, from whom the executive department is evolved. It also differs from the German Reichstag, before which the government bills are laid, and whose members are aware that a law exists that authorizes its dissolution and the power to order that "a new election shall take place within ninety days." A conspicuous political fact in Germany is this. A characteristic feature of the representatives of the people is that they are imbued with veneration for the Emperor as Commander-in-Chief, and regard themselves in the first place as soldiers; naturally, therefore, it is the name of the Emperor and not the name of the people that influences the Reichstag. The French Chamber of Deputies is also inseparably connected with the Executive, in spite of France's republican form of government. We notice that in Great Britain, Germany, France, Italy, and Japan the legislative and executive departments settle questions relating to the constitutional construction to be placed upon the division of the governmental powers for themselves, without having recourse to a court of law and without waiting for the interposition of the people. In Japan, the Imperial House of Representatives may be dissolved by order of the Emperor, and

is so dissolved, on an average, every alternate session. This in turn dissolves every alternate Cabinet Ministry. But the Japanese people have their consolation in the words of the compilers of the Constitution: "Should the Constitution not have fixed the term for newly convoking the House after its dissolution, its existence would be left to the mere caprice of the Government."

To become a candidate for the House of Representatives in Japan the following qualifications are requisite. The regulations as to conduct and character are expressed clearly and concisely. First, the candidate must be a subject of the Emperor and over thirty years of age. Any one is barred from office who has been pronounced by a court unsound in mind and body; who is in a state or condition of bankruptcy, or one who has not received pardon after such bankruptcy; one who has been deprived of an office of public trust; one who has had the charge of felony preferred against him and who has not, by a competent court, been exonerated. Neither can a successor to a peerage become a candidate for Representative, nor one who is serving in the army or navy, or who has been drafted for that purpose; none who are attending college or school; no teacher, nor any person who is serving as a priest or teacher of Shintoism or any other religious creed, or who has so served, unless his service has expired for fully three months; no member of the House of Peers, which is the upper house, is eligible; no one who has contracts with the Government, nor a person who serves in a corporation having such contracts, or who serves the Government in any manner, nor any one whose service in election matters has not expired for three months; no officer of the imperial household; no judge, or public procurator, government treasurer, tax collector, no member of the District or Prefectural Legislature, nor any police officer.



The voters for members of the House of Representatives shall be subjects of the Emperor, over twenty-five years of age,<sup>5</sup> and must have paid over ten dollars in land tax for more than one year to the national revenue, or other taxes for more than two years. Beyond these requirements, the specifications are nearly the same as those enumerated as necessary to become a candidate for membership in the House of Representatives.

It may be true of the Imperial Diet—which is composed of the House of Representatives and the House of Peers—what has been said by Prince Ito: “The Diet is politically established for the purpose of representing the will of the people.” It may also be true that the Diet is established, as Ichiki rightly claims, “so that the aim and end of the Constitutional Government shall be fully carried out.” But it is an incontrovertible fact that the will of the state or nation of Japan will be constitutionally the will of the Emperor and not the will of the people. How can the Imperial Diet represent what it is not authorized to represent? Hozumi’s contention is that “it cannot be legally capable, for it is nowhere found in the Imperial Constitution that the Diet is authorized to sit as the representative assembly of the people.” This contention is in accord with and worthy of Japanese constitutional construction. Along this line, Ito declares his theory of the Constitution to be, that the rights—only four rights—of the Imperial Diet shall be recognized. These four rights, according to his own language, are: “First, the right to receive petitions; secondly, the right to address the Emperor and to make representations to him; thirdly, the right to put questions to the Government and demand explanations; and fourthly, the right to control the finances.” It is fully known, and goes without saying, that the Emperor can accept or reject any and every law drawn by the Diet. For legal proof,

<sup>5</sup>Japanese men are of age at twenty.

we quote the Imperial speech on the promulgation of the Constitution: "Whereas, We make it the joy and glory of our hearts to behold the prosperity of our country and the welfare of our subjects, We do hereby, in virtue of the imperial power We inherit from our imperial ancestors, promulgate the present immutable fundamental law for the sake of our present subjects and their descendants."

What a violent contradiction we here behold between the intent, purpose, and spirit of the Constitutions of Japan and of the United States!

In America, every Senator and Representative receives a salary of \$7,500, determined by law. In Japan, members of the House of Peers and the House of Representatives are compensated to the amount of 3,000 yen, according to Article XIX of the Parliamentary law. The office of Speaker of the Japanese House, like that of the Speaker of the House of Commons, of the French Chamber of Deputies, and of the United States House of Representatives, is a position of trust and influence and carries much dignity with it.<sup>6</sup> We here observe a special feature in this office in the House of Commons by comparing it with that in the lower house in the United States and in Japan. In the United States and in Japan, generally speaking, the Speakers are the creatures of the prevailing political party, and are expected to create such conveniences as are useful to their respective parties. It is, however, the parliamentary rule in England that they shall shake off all party ties and sympathies and maintain the strictest neutrality and impartiality. In America the election of a Speaker is an event of the greatest importance, and by this election the one chosen becomes second only to the

<sup>6</sup>Teiishi Sugita, the present Speaker of the Japanese House, presides over both the House and the leading political party, "Seiyukai," which was first organized by Prince Ito, who on becoming the Premier left his position to Marquis Saionji.

President, but is in practice often more powerful than he. He virtually controls the various committees on the money affairs of the country, and openly carries out the wishes of the political party from which he came.<sup>7</sup> If rightly used, the office of Speaker is a ladder by which the occupant might reach the office of President. At present the salary of the Speaker of the United States House is \$12,000 annually, \$4,500 more than an ordinary member of the House. In Japan the Speaker receives an annual salary of 5,000 yen, or 2,000 yen more than an ordinary member of the House.

In the United States the electors of the Representatives are no more the rich than the poor, nor the learned in preference to the unlearned; neither do conditions of birth or fortune weigh in the consideration of fitness for office. The electors are the great body of the people of the United States; they are the same who exercise the right in every State of electing the two branches of the Legislature of the State. Any citizen who merits the confidence and esteem of his countrymen may become the popular choice. No qualification, such as wealth, birth, religious opinion, or civil profession, is permitted to fetter the judgment or disappoint the inclination of the people. When we consider the situation of the men on whom the trust of representation is bestowed by the free suffrage of their fellow-citizens, we shall find that the situation involves every security which can be desired to insure their fidelity to their constituents. The supposition is natural that, as they have been singled out and distinguished by the preference of their fellow-citizens, they must also be somewhat distinguished by those qualities which will entitle them to this preference, which will induce

<sup>7</sup>Joseph G. Cannon, the present Speaker of the U. S. House, is reputed as the most popular Republican Speaker. His characteristic sympathy is beloved by all who know him. "He is," according to Vice-President Fairbanks, "the modern Lincoln."

in them a sincere and scrupulous observance of their engagements. Moreover, the circumstances under which they enter the public service cannot fail to produce an at least temporary affection for their constituents. There is in every breast a sensibility to marks of honor, of favor, of esteem, and of confidence, which, apart from all other considerations, begets a desire to make some grateful and beneficial returns. Ingratitude is a charge commonly made against human nature, and it must be confessed that instances of it are but too frequent, both in public and private life; at the same time, it is shown to be a despicable fault by the universal indignation and contempt it inspires. Again, the Representative is bound to his constituents by ties of a more selfish nature. His pride and vanity are engaged in sharing with them any honors and distinctions that may be gained. Although some few aspiring characters may entertain hopes and projects not in keeping with the interests of their constituents, the large majority of men who hope to derive their advancement from their influence with the people, have more to hope from a preservation of that influence than from any innovations in the Government in opposition to the voice and authority of the people. Finally, all the securities might be found insufficient without the restraints of frequent elections. The House of Representatives is so constituted as to support in its members the habitual recollection of their dependence on the people. Before the sentiment impressed on their minds by the mode of their elevation can be effaced by the exercise of power, they are compelled to anticipate the moment when their power is to cease, when the manner in which they have exercised their power is to be condemned in most impressive style, and when they must descend to the level from which they were raised, there to remain forever, unless a faithful discharge of their trust is shown and thereby a title for the renewal of

their power is granted. The last, and probably the most thoroughly protective measure which surrounds the House and restrains it from oppressive legislation, is that the members can make no law which will not fully operate on themselves and their friends as well as on the larger mass of society. This has always been deemed one of the strongest bonds by which human wisdom can connect the rulers and the people. It creates between them that unity of interest and sympathy of sentiment of which few governments have furnished examples, and without which every government degenerates into tyranny. If the question should be asked, what is to restrain the House of Representatives from making laws discriminating in favor of themselves, or a particular class of society, the answer is, the genius of the whole system, the nature of just and constitutional laws, and, above all, the just and manly spirit which actuates the people of America, a spirit which nourishes freedom and in return is nourished by it. If this spirit of freedom, the groundwork of the American Constitution, should ever become so far debased as to tolerate a law not obligatory alike on both Legislature and people, then the people will be prepared to tolerate something that is not liberty.

We next enter into a discussion of the functions of the Senate of the United States. We pause here to ask our readers to suspend their judgment and refrain from pronouncing sentence, on the ground that the working of this upper house differs from that of the corresponding august assemblies in European and Asiatic countries, which differences we propose to expound. There exists no analogy between the American Senate and the upper houses on the other side of the oceans. Chief among the differences to be observed is that the American Senators are elected by the Legislatures of the different States of the Union, which Legislatures are elected by the votes of the



people; also that the Senate acts as a check and balance on the policy of the House of Representatives and the one-man policy of the President. Numbering as a whole ninety-two members, it closely resembles a family group. The smallness of the number and the longer official term they serve engenders in them a thorough understanding of the traits and character each of the other, and also develops strength in debate. It must be borne in mind that these men are selected by the State Legislatures to represent their respective States, and that they have shown the greatest power, efficiency, capacity, and foresight in the affairs of their respective political parties, holding as they do the highest political honor the citizens of a State can confer. It is frequently the highest ambition of an American citizen to become a Senator. The President, after the expiration of his term of office, may well look to membership in this august assembly for a continuance of his political life and of his power to serve the national need. Above all, we would remark that the most ennobling feature in this connection is that any citizen may attain to this position by development of his intellectual powers, morality of life, and honorableness of purpose. It is not, as in Japan, Great Britain, and Germany, a princely gift, nor is it hereditary. In Japan a member of the House of Peers must be one of the fifteen inhabitants over thirty years of age in a city or prefecture who pay the highest direct national taxes on land, industry, or trade; or he must be nominated by the Emperor for meritorious service to the State, or because of profound erudition. Moreover, the number of these two latter classes of members must not exceed the number of members having the title of nobility. This party is in the majority, and includes by law the members of the imperial family after reaching their majority. Princes and marquises are eligible after reaching twenty-five years of age; counts, viscounts, and barons,

having arrived at this same age, may serve seven years; the latter three, however, must be elected by the members of their respective orders, and must not exceed one-fifth of the number of their respective orders. With reference to the House of Peers, the very Constitution itself presents somewhat of unconstitutionality, even from the Japanese subjectively constitutional point of view. It is true that the Imperial ordinance, concerning the House of Peers, provides in its Section XIII that when in the future any amendment or addition is to be made in the provisions of the present Imperial ordinance, the matter shall be submitted to the vote of the House of Peers. But the Constitution does not specify anywhere that this so-called representative body of the people shall be regulated as to its numbers by the law of the country. The number of counts, viscounts, and barons who may become members can be changed by the Imperial ordinance from time to time, and the people of the country, even the qualified members, do not and cannot know what that number is to be until the Diet is about to be convoked. Therefore it is plain that the House of Peers is governed by the mere will of the Emperor.

In the United States the Senate is the strictest creation of the Constitution. It shall be composed of two Senators from each State, chosen by the Legislature thereof. To the Senators, as well as to the members of the House of Representatives and to the American public generally, no title of nobility shall be granted by the United States. They are also bound by the provision that no person holding any office of profit or trust under the Government shall, without consent of Congress, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state.

The qualifications of Senators, as distinguished from those of Representatives, consist in a more advanced age and a longer



period of citizenship. Senators are also elected for a longer term of office. A Senator must be thirty years of age, and a Representative, twenty-five. A Senator must be a citizen of the United States, and if a naturalized citizen, must have been such for nine years; while the latter, if a naturalized citizen, must have been such for seven years. The duration of the office of Senators is six years and that of Representatives two years.

The propriety of these distinctions is explained by the nature of the senatorial trust, which, since it requires a greater amount of information and ability, demands that a period of life shall have been reached most likely to supply these advantages. Participating immediately in transactions with foreign countries, none ought to be elected Senators who are not thoroughly weaned from the prepossessions and habits incident to foreign birth and education. The term of nine years appears to be a prudent mean between a total exclusion of adopted citizens whose merits and talents may claim a share in the public confidence, and an indiscriminate and hasty admission of them which might create a channel for foreign influence on the national council. It is unnecessary to dilate on the election of Senators by the State Legislatures. Among the various modes which might have been devised for constituting this branch of the Government, that which was finally proposed by the Constitutional Convention "is probably the most congenial with the public opinion." It is recommended by the double advantage of favoring a select appointment and of giving to the State a government which will make secure its authority and which will also form a convenient link between the two sovereignties.

A greatly debated question in the Constitutional Convention was the question of the equality of representation in the Senate. How uncompromisingly this question was discussed in the Convention we can readily see when we quote from its records. Mr.

Mason, speaking in defense of the measure, said: "I will bury my bones in this city rather than expose my country to the consequences of a dissolution of the Convention." The result, as we see it, is evidently the result of a compromise between the opposite contentions of the large and the small States. The equal vote allowed to each State is at once a constitutional recognition of the portion of sovereignty remaining in the individual State and an instrument for preserving that residuary sovereignty. Another advantage accruing from this ingredient in the constitution of the Senate is the additional impediment it must prove against improper acts of legislation. No law or resolution can now be passed without the concurrence, first, of a majority of the people, and then of a majority of the States. The duration of the senatorial office was next to be considered. The debate over the term was no less than that over equality of representation, being a very heated one. When the term of six years was proposed by Gorham and Wilson, it was carried by the vote of seven States against four, with the understanding of biennial renewals of one-third of the membership. The mutability of public councils which would arise from a rapid succession of new members, however qualified they might be, points out in the strongest manner the necessity for some stable institution in the Government. In the words of the *Federalist*, "Every new election in the States is found to change one-half of the Representatives." From this change of men must proceed a change of opinions, and from a change of opinions a change of measures. But a continual change even of good measures is inconsistent with every rule of prudence and with every prospect of success. This fact is verified in private life and becomes more just as well as more important in national transactions. Another effect of public instability is the unreasonable advantage it gives to the sagacious, the enterprising, and the

moneyed few over the industrious and uninformed mass of the people. The most deplorable effect of all is that diminution of attachment and reverence which steals into the hearts of the people towards a political system which betrays so many marks of infirmity and disappoints so many of their flattering hopes. No government, any more than an individual, will long be respected without being truly respectable, nor be truly respectable without possessing a certain degree of order and stability.

Within the walls of the Constitutional Convention, as within the present national legislative halls—at the time of Washington, Jefferson, and Hamilton—during the days of Clay, Calhoun, and Webster, and now under Roosevelt, Taft, Cannon, Sherman, and Williams, there have been and still are many who say that a Senate not elected immediately by the people, and serving for the term of six years, must gradually acquire a dangerous pre-eminence in the Government and finally transform it into a tyrannical aristocracy.

Standing beside the great currents of modern progress, especially that of the individualistic, democratic progress of America, it might be supposed that the direct choice by the people of the State in general, made after close study of the character and merit of a man, would be the most successful course. Yet, on the other hand, the history of the American Senate shows it to have been a greater success than any of the upper houses in other constitutional countries. The ideals of the Senate as they have been expounded and are still adhered to by the political schools of Madison, Hamilton, and Jay, are best expressed by referring to what was said in advocating the indirect election of Senators at the adoption of the Constitution. It was said that the people fully understood that, even though the Senators were to be elected only indirectly by the people, the Senate would not be transformed into a tyrannical aristocracy.

Before such a revolution can be effected, the Senate, it is to be observed, must in the first place corrupt itself; it must next corrupt the State Legislatures; it must then corrupt the House of Representatives; and finally it must corrupt the people at large. It is evident that the Senate must be first corrupted before it can attempt an establishment of tyranny. Without corrupting the Legislatures it cannot carry out the attempt, because the periodical change of members would otherwise regenerate the whole body. Without exerting the means of corruption with equal success on the House of Representatives, the opposition of that co-equal branch of the Government would inevitably defeat the attempt; and without corrupting the people themselves a succession of new Representatives would speedily restore all things to their pristine order. After all, the people, as the American national sovereign, can at any time adopt or reject the direct election of the Senators. Until necessity arises for the latter course the present constitution of the Senate stands.

We have understood, without doubt, that the Government of the United States is one of limited powers, and that no department—Executive, Legislative, or Judicial—possesses any authority not granted by the Constitution. But we must remember also that it is not necessary to show a particular and express grant in order to prove the existence of a particular authority. The design of the Constitution was to establish a government competent for the direction and administration of the affairs of a great nation, and at the same time to mark out sufficiently definite powers, coupled with such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers must be and are extensive. It has been found, indeed, in the practical administration of the Government, that a very large, if not the largest,

part of governmental functions has been performed in the exercise of the powers thus implied. But the extension of power by implication was regarded with some degree of apprehension by both the wise men who framed the Constitution and the intellectual citizens who adopted it. This apprehension is manifested in the terms by which the grant of incidental and auxiliary powers is made. All powers of this nature are included under the grant of the power to make all laws necessary and proper for carrying into execution the powers expressly granted to Congress, or vested by the Constitution in the Government or in any of its departments or officers.<sup>8</sup>

Before proceeding to consider the judicial construction of the powers conferred upon Congress by the Constitution, it is well for us to keep constantly in view the fact that all the powers of Congress must be regarded as related to each other, that all are a means to a common end. The importance of any particular power should not be judged by the length or scope of our treatment of it. In the language of the Supreme Court, "No single power is the ultimate end for which the Constitution is adopted. It may, in a very proper sense, be treated as a means for the accomplishment of a subordinate object, but that object is itself a means designed for an ulterior purpose."<sup>9</sup>

<sup>8</sup>Art. 8, cl. 18, U. S. Const.

<sup>9</sup>12 Wall. 457-532.

## CHAPTER VI

### FINANCE

**B**Y Constitutional provision, Congress is authorized to raise revenue by taxation, and to apply the same to national expenses. The bills for such expenditures originate in Congress, and this prerogative adds greatly to the weight and dignity of this branch of the Government.

The Congressional Committee on Finance resembles the Japanese or the French Ministers of Finance, and the Exchequer in England. European and Japanese students may wonder why American national financial affairs originate and terminate in Congress, and not through the co-operation and assistance of the Executive branch of the Government, or at least of the financial minister. There is no cause for wonder, however, when we learn that this specific power was vested in Congress by Constitutional authority and not in the Executive department. The party responsible, and the one to which the people look for an account of the disbursement of their money, is Congress. In the Japanese and European systems of government the executive department is responsible; in the event of its explanation of expenditure not being sufficiently satisfactory, a resignation is in order. But in the United States the Cabinet is not called upon to give any account of its expenditures, nor have the people any expectation that it will do so. Unlike the Japanese and European cabinets, which originate and defend expenditures to their finality, the American Secre-



tary of Treasury, or Chief of the Treasury Department of the President's Cabinet, simply sends in statements and proposals of expenditures to Congress. There his responsibility stops. The Secretary cannot originate any financial bills, nor take part in any debate regarding them; neither does he need to give an explanation for such statements and proposals. It is the Constitutional right of the Japanese Minister of Finance to participate in all questions of national finance in the Imperial Diet; in the United States the Secretary of the Treasury is prohibited by law from taking any part in any such debate, even should it be apparently necessary. In the case of a financial statement submitted by the President's Cabinet being rejected by the House, it can be carried to the Senate, and if rejected by the Senate also, the Cabinet must, as a last resource, carry it to the next session of Congress and report it as a deficiency bill. Whereas in Japan, if the Diet—that is, the House of Representatives and the House of Peers—rejects a bill, the Cabinet has a decisive weapon to force its recognition, viz., dissolution of the Diet. There is one other step that the Japanese Cabinet can take, given a Constitutional measure. According to Article LXX of the Constitution, “the Government may take all necessary financial measures by means of an Imperial ordinance.” However, this measure, whatever it may be, “shall be submitted to the Imperial Diet at its next session and its approbation shall be declared thereto.” And according to Article VIII, “if the Imperial Diet does not approve the said ordinance, the Government shall declare it void for the future.” But what would be the result, in the event of the Diet refusing to give its approval to what has already been done under such an extraordinary measure? In other, perhaps plainer language, is the Imperial ordinance retrospectively annulled by reason of such refusal on the part of the Diet? We answer the question

in the words of Ito: "As the sovereign is authorized by the Constitution to issue emergency ordinances in the place of law, it is a matter of course that such ordinances should have effect as to the period of time they have been in existence."

Congress shall have power "to levy and collect taxes, duties, imposts, and excises," and also power "to borrow money on the credit of the United States." The Constitution places these powers in the forefront of all the Congressional powers granted by it because the financial question, in this as in every other country, must essentially affect the welfare of the nation; according to the measure of justice and wisdom in its financial administration will be the progress or retrogression of the nation. It is noticeable that in the United States the question of national finance is less discussed in public by the Americans, who naturally discuss everything, than by the people of Europe and Asia, who, in general, are so much less given to discussion. The peculiar significance of this may be explained by the unique position occupied by the people of the United States. No people are more luxurious and money-spending than the Americans. The taxes collected on luxuries amount to an enormous sum, so in turn the taxes press less heavily on the people; and, moreover, the method of taxation is indirect. Besides this, there exists here no necessity for an outlay for maintaining a big army and navy, which is a heavy drain on the nations of Europe and Asia, entailing a burden of taxation on and often weakening the vitality of the people of those nations.<sup>1</sup> Then,

<sup>1</sup>Compared to the extravagancy of present-day militarism of the world, the occasional appropriations in the U. S. Congress for military purposes may be said to be insignificant. The American per capita contribution to military expenses and the national wealth, when compared to that of other countries, justifies the conclusion that American military appropriations, instead of increasing, are cutting down the total of the world's military expenditures. The body of Americans, if not all, could not tolerate any other course of action.

too, no other nation has been favored with such diversified resources, such wealth of every description hidden in the bosom of the earth, waiting only the skill of American hands to bring it forth. This wealth lies in the fertility of the soil, the vast timber resources, and in yet unknown and inexhaustible mineral treasures. All of these resources do and will continue to yield an enormous and elastic revenue to the Government of the people. Congress displays a liberal spirit in the expenditure of this money, as may be seen in the valuable assistance rendered in any matters relating to the national welfare or even to State affairs, and also in its generous contributions for the governmental publications emanating from Washington, by which even Europeans and Asiatics are benefited. In Europe or Asia we occasionally notice the arguments against the protective tariff because of the frequent tie-ups of internal commerce. Some observers who carelessly consider the well-settled and irresistible doctrine of protection may possibly say that America's occasional depression in finance is evidence of the folly of the protective tariff. But the Americans say that the revision of the tariff system of this country may, from time to time, be made, but it will be merely an adjustment of tariff schedules to modern conditions, or a correction of them whenever there are economic changes indicating they are either too high to be just or too low to encourage industry. The American people fully appreciate that commercial prosperity depends upon the profitable employment of capital and the liberal remuneration of labor. It is a well-settled doctrine in America that if schedules be reconstructed to remove inequities or excesses, the work should be done without impairing the living and beneficial purpose of the doctrine of protection. Americans will oppose any suggestion of free trade or any other dogmatic demands. So that when any discussion or dissatisfaction arises among Ameri-

cans relative to the government of the national finances, the problem is how to spend the money, not how to raise it.

The various States, too, are prosperous, having more to spend than they require, even though many taxable State properties escape taxation. In the State Legislatures any bill for revenue must, as in the National Legislature, usually originate in the lower house. This is not true in a few States. The members of both State houses are, of course, elected by the direct vote of the people of the State. The revenue of the State is raised by taxation based on a valuation of all property, real and personal, within its boundary. But behind all the evidences of the increasingly prosperous condition of national and State finance there are laws of taxation, either State or national, that foster this prosperous condition. Therefore, inquiry into these laws and the reasons for their existence is not only time well spent, but also an essential part of an investigation, by native as well as by foreign students.

The power to tax is an attribute of sovereignty and is co-extensive with the subjects over which the sovereignty extends. It is unlimited in its range, acknowledging in its very nature no limit, so that security against its abuse is to be found only in the responsibility of the Legislature which imposes the tax to the people who are able to pay it. This specific power of the American National Legislature is vitally important in the maintenance of the Government; the want of this power was chief among the causes for the failure of the old Confederacy. It was also this power, misapplied and arbitrarily exercised, which was the principal cause for the separation of the English colonies in North America from the mother country. Borrowing the language of Chief Justice Marshall, "England has no written Constitution, it is true, but it has an unwritten one, resting on the acknowledged and frequently declared privileges of Par-

liament and the people, to violate which in any material respect would produce a revolution in an hour. A violation of one of the fundamental principles of that Constitution in the colonies, namely, the principle that recognizes the property of the people as their own, and which, therefore, regards all taxes for the support of government as the gift of the people through their representatives, and regards taxation without representation as subversive of free government, was the origin of our revolution."

The word tax is defined in the most enlarged sense as embracing all the regular impositions made by the Government upon the persons, property, privileges, occupations, and enjoyments of the people for the purpose of raising public revenue. Duties, imposts, and excises imposed for this purpose are in a strict sense taxes. But the word taxes is often used in contradistinction to these levies, so it will conduce to clearness to name them separately. The terms duties and imposts are clearly synonymous, and are usually applied to the levies made by the Government on the importation or exportation of commodities; while the term excises is applied to the taxes laid upon the manufacture, sale, or consumption of commodities within the country, and upon licenses to pursue certain occupations.<sup>3</sup> There is nothing which can be the subject of property which cannot be the subject of taxation. Of all burdens imposed upon mankind that of grinding taxation is the most cruel. It is not taxation that one government should take the profits and gains of another. That is taxation which compels an individual to pay for the support of his own government from his own gains and out of his own property.

Here let us take up the much-discussed question of income taxation. This involves a separation of taxes into two classes, the direct and the indirect tax. This classification of the meth-

<sup>3</sup>20 Wall. 36; 73 Me. 518.



ods of raising each class of taxes invites attention to a most important question and one which must be answered. The tax levied upon the property, person, business, and income is a direct tax. Taxes on real estate are direct taxes, as are also all taxes on personal property or on the income from personal property. That termed indirect is the tax laid upon commodities before they reach the consumer, and is paid by the person upon whom such tax ultimately falls, not as taxes, but as part of the market price of said commodities. The income tax law of 1894 was held unconstitutional by the final authority of the country on the ground that direct taxes must be apportioned among the several States in proportion to population. The act of 1894, so far as it concerned the income from real estate and from personal property, was a direct tax on such property, and therefore void because not apportioned according to representation.<sup>4</sup> It is noticeable, however, that the State revenues are largely raised by direct taxation, while the national revenues are raised almost entirely from indirect taxation. This difference is readily explained and is seen to be unavoidable when we read that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports."<sup>5</sup> However, a graduated income tax of the proper type is considered to be the most desirable method of taxation, whether for Federal or for State purposes. Among all methods of taxation, the administration of the income tax is the most difficult and the easiest to evade. If the systematic evasion of the income tax practiced in some States were practiced in the Federal administration, the burden of the support of the Government would fall more heavily upon honest citizens. The result would be worse with the law than without it. A still harder question is the devising of a law that

<sup>4</sup>158 U. S. 601.

<sup>5</sup>Art. 1, Sec. 10, U. S. Const.



will be construed constitutional, instead of one like the income tax law of 1894, which the United States Supreme Court rightly construed as unconstitutional, although we are aware of the dissenting opinion in that case of a great constitutional authority of the country, Mr. Justice Harlan. A strange phenomenon in the present-day politics of this country, in which the leader of one party always strives to devise a better policy than the leader of the other party, is the fact that the two leaders, Mr. Theodore Roosevelt and Mr. William J. Bryan, present a united front to the people on this question of the income tax. "There is a better form of taxation," says Bryan, "even than property taxation; it is income taxation, which makes people pay according to the income they enjoy." According to Mr. Roosevelt, "most civilized countries have an income tax and an inheritance tax. In my judgment, both should be a part of our system of Federal taxation." As a matter of fact, Great Britain, Germany, Japan, and France have their income and inheritance taxation. But, in any event, the American people will settle this momentous question as they like, and will have their representatives carry out their will—whether it be to have an income tax or no income tax. In the meantime they will go on with the present laws on taxation as they understand them.

We must not lose sight of the well-understood principle of law that there are and must be certain rights in every free government beyond the control of the state. In the language of Mr. Justice Miller, "A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens at all times under the absolute disposition and unlimited control of even the most democratic depository of power, is, after all, but a despotism. It is true, it is a despotism of the many, of the majority, if you please to call it so, but it is none the less a despotism. It may be doubted, if a man is to

hold all that he is accustomed to call his own, all in which he places his happiness, under the unlimited dominion of others, whether it is not wiser that this power should be held by one man than by many." The theory of American government, both State and national, is opposed to the deposit of unlimited power anywhere, whether in the many or in the few.

There are limitations to the taxing power which grow out of the essential nature of all free governments. These are implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name. According to the Supreme Court, "No court, for instance, would hesitate to declare void a statute which enacted that A and B, who were husband and wife to each other, should be such no longer, but that A should thereafter be the husband of C, and B the wife of D; or which would enact that the homestead now owned by A should no longer be his, but the property of B." Of all the powers conferred upon government, that of taxation is most liable to abuse. Given a purpose or subject for which taxation may be lawfully used, the extent of its exercise is then in its very nature unlimited. It is true that express limitations on the amount of the tax to be levied, or of the things to be taxed, may be imposed by constitution or statute, but in most instances for which taxes are levied, such as the support of government, the prosecution of war, national defense, any limitation of the taxing power is unsafe. The entire resources of the people should in these instances be at the disposal of the Government.

The power to tax is, therefore, the strongest, the most universal of all the powers of government, reaching directly or indirectly all classes of the people. What Chief Justice Marshall said is true, that "the power to tax is the power to destroy."

Take, for instance, the case of "*Banks versus the Mayor*."<sup>6</sup> It was held in that case that the State cannot tax banks organized by the cognizance of the National Government. Congress is empowered to "borrow money on the credit of the United States," so that State taxation of the national banks is the taxation of the Federal obligations for the payment of money issued for purposes within the Constitutional range of powers. Such taxation necessarily implies the assertion of the State's right to exercise such control over the Constitutional power of the National Government. On the other hand, Congress may impose a tax of ten per cent. on the circulation of all banks other than the national banks.<sup>7</sup> Thus we have noticed that most striking instance of the truth of the legal maxim, that "the power to tax is the power to destroy." This power can as readily be employed against one class of individuals as in favor of another, so that one class may be ruined and the other given unlimited wealth and prosperity, if there is no implied limitation of the purposes for which the power may be exercised. But to lay, with one hand, the burden of government on the property of the citizen, and with the other, to bestow its aid upon favored individuals to aid private enterprise and build up private fortune, is none the less a robbery because it is done under the forms of law and is called taxation. This is not taxation. It is a decree under legislative forms. Taxes are a public imposition, levied by authority of the Government for the purpose of carrying on the Government with all its machinery and varied functions—in short, they are imposed for a public purpose. We have established, we think, beyond cavil that, according to a proper understanding of the principle of taxation in the United States, "there can be no lawful tax which is not laid for a public purpose."

<sup>6</sup>7 Wall. 16.

<sup>7</sup>3 Dall. 171; 7 Wall. 433.

## CHAPTER VII

### COMMERCE

CONGRESS shall have power to regulate commerce with foreign nations, among the several States, and with the Indian Tribes.<sup>1</sup> The conspicuous words in the commerce clause are, "to regulate commerce." They at once suggest the extent of the power, which is "to regulate," and the subject of the regulation, which is "commerce."

The highest tribunal of the land, from the time of Marshall to that of Fuller, has almost continually discussed and construed the extent and meaning of this power, and the object as well as the subject of its exercise. Nevertheless, the expounders of the Constitution in the succeeding generations of Americans have occasionally disagreed in several important particulars. Our task, therefore, must be not only to present the different decisions of the Supreme Court, but also to distinguish the points at issue and to emphasize those underlying principles upon which our conclusions are based. When Chief Justice Marshall was expounding this clause it was at a time when even the knowledge of Washington's death could not reach Boston in less time than ten days, and Cincinnati in less than three weeks. It was at a time when an Atlantic voyage between New York and London took somewhere about forty or forty-five days. But now, when Chief Justice Fuller construes this particular clause of the Constitution, is a time when the report

<sup>1</sup>Art. 1, Sec. 8, U. S. Const.

of Queen Victoria's death was printed and circulated in the streets of San Francisco almost simultaneously with the official bulletin posted for Victoria's subjects in England. When the first important case under the commerce clause was before the Supreme Court,<sup>2</sup> communication between Washington and New York was more difficult than it is to-day between Washington and Tokyo.

"To regulate commerce" are but few words to have been stretched over such an extensive field. Out of one Constitutional construction has grown another. The judges in the courts, like James Watt at Glasgow University, did not anticipate the complications they were to give the generations that followed them. From the invention of the steam engine resulted not only other steam engines, but also steamships and railroads. They in turn gave rise to one factory after another. The factories need supplies of coal. Coal produces gas, and gas made possible gas engines. Next came the telegraph. The telegraph was the forerunner of the oceanic cable and a step towards the telephone, which in turn has led to wireless telegraphy. Little wonder the judges have had to disagree, and that the courts have given different decisions in their construction of the commerce clause. When ships float through the air it will be necessary for the Supreme Court to devise a construction of the clause which shall apply to airships.<sup>3</sup>

Regardless of what may be the future construction, we must use our best efforts in order to arrive at a proper understanding of the present construction of the commerce clause. America,

<sup>2</sup>9 Wheat. 1.

<sup>3</sup>The Commerce Clause, in the near future, may be expected to be developed so as to more completely apply to rivers, canals, and the high seas, and another interesting legal expounding to an unknown degree may be expected. The American people should take immediate steps to supplement their railway system by a complete system of waterway transportation.

as we have often declared, is the country of law, and not of one man or of any set of men. No matter how much human invention and ingenuity may contribute to the nation's progress, they must be governed by the law, as between man and man, and as between State and State. And that law, we hold, naturally has been sometimes without reason. Looking at law in this light, and reviewing the numerous decisions, we see that it was not so much the fault of the judges that they disagreed in their interpretations, but the fact of the multiplying inventions that necessitated the judges' disagreement. So that the laws that the courts gave us were necessarily only reasoning—very good reasoning, however, that still stands in order for us to understand our present problems. In attempting to investigate the decisions of the courts, we should never say that they belong to the "forgotten past." Such a saying is not only ungrateful, but it is more than that. It is almost a crime against the nation. Let us now cautiously review the time-honored decisions of the Supreme Court, which are so vital and so pertinent in their application to the proper construction of this particular Constitutional clause.

"The subject to be regulated is," said Chief Justice Marshall, "commerce, and our Constitution being, as was aptly said at the bar, one of enumeration and not of definition, to ascertain the extent of the power it becomes necessary to settle the meaning of the word. The counsel for the appellee would limit it to traffic, to buying and selling, or the interchange of commodities, and does not admit that it comprehends navigation. This would restrict a general term, applicable to many objects, to one of its significations. Commerce is undoubtedly traffic, but it is something more, it is intercourse. If commerce does not include navigation, the Government of the Union has no direct power over that subject, and can make no law prescribing



what shall constitute American vessels, or requiring that they shall be navigated by American seamen. Yet this power has been exercised from the commencement of the Government, has been exercised by the consent of all, and has been understood by all to be commercial regulation. All America understands and has uniformly understood the word 'commerce' to comprehend navigation. It was so understood and must have been so understood when the Constitution was framed. The power over commerce, including navigation, was one of the primary objects for which the people of America adopted their Government and must have been contemplated in forming it. The Convention must have used the word in that sense, because all have understood it in that sense, and the attempt to restrict it comes too late."<sup>4</sup> Thus the American Chief Justice interpreted the law as applied to Watt's steam engine. Fulton afterward helped the court to enforce its decision by welding the Union of States into a solid nationality.

The subject to which the power is secondly applied in the Constitution is to commerce "among the several States." During the rapid development of steam traffic upon the western rivers and the Atlantic, together with the development of the railroad, which connected the cotton-growers of the South with the cotton mills of New England, it would seem that the conspicuous word "among" in the Constitutional provision must have some time been construed. So it has been, indeed, the Supreme Court quite properly saying that "the word 'among' means intermingled with. A thing which is among others is intermingled with them. Commerce among the States cannot stop at the external boundary line of each State, but must be introduced into the interior." Consequently, the act of Congress or a treaty with a foreign country on the subject is supreme, and the law of the

<sup>4</sup> Wheat. 1.

State, though enacted in the exercise of powers not controverted, will have to yield. It was the development of the means of carriage and communication that brought about a stronger consolidation of North and South. It brought about the great Civil War, but it also caused disunion to become intolerable and impossible. "England is mistaken to aid the Confederacy," said Gladstone, "because opposition against the Union means opposition against the law of gravitation."

The commerce clause of the Constitution, the first foundation of which was laid by Roger Bacon, whose cornerstone was supplied by James Watt, whose perpetuation was made necessary by such men as Bell and Marconi, continually increases in importance. The judges of the Supreme Court, in the meantime, have directed its development. It is wonderful to behold how their genius and wise statesmanship have, from time to time, brought the ship of the nation into safe anchorage, and written the history of commercial prosperity. This clause is so very important that we will search extensively the reports of its development through the century given to us by the courts, because we think them indispensable in the study of the commerce clause.

The State Legislature of Alabama enacted a law commanding the owners of steamboats navigating the waters of the State to file a statement with the probate judge of Mobile County setting forth the names, residences, and interests of the owners. This was held invalid as conflicting with the act of Congress concerning the enrollment and licensing of vessels.<sup>5</sup> A statute imposing a license tax, not on the vessels as property, but on the business of owning and operating towboats between New Orleans and the Gulf of Mexico, was held invalid, because, as the court said, it puts a price on the privilege of navigating

<sup>5</sup>22 How. 227.

the Mississippi.<sup>6</sup> Closely following this decision, we notice that the same principle is applied in case of a vessel going between the ports of the same State, but passing upon the high seas. Not being engaged in purely domestic commerce, it is therefore subject to Congressional legislation.<sup>7</sup> While we are thus beholding the paramount authority of the national legislative power in the regulation of commerce among the States, we see another and opposing authority, the paramount authority of the State in its police power. All the authorities agree that the State's police power within the State is paramount and that nothing can stand before it when exercised within its proper sphere. But this police power, too, has been obliged to yield in some cases where it came in conflict with an act of Congress.

The necessity for this power of Congress is readily understood if we study the condition of the country previous to the adoption of the Constitution. The oppressed state of commerce at that time can scarcely be imagined. It was controlled by foreign nations with a single view to their own interests, and the American efforts to counteract their restrictions were rendered impotent by want of co-operation. It is not, therefore, a matter of surprise that the grant of power should have been as extensive as the mischief it was intended to remedy, comprehending as it does all foreign commerce and all commerce among the States. To illustrate: The State of Maryland passed an act requiring importers of goods to take out a license and pay license fees, but this was held by the Supreme Court to be an encroachment upon the powers of Congress. "To construe the power so as to impair its efficiency," said the Supreme Court, "would tend to defeat an object in the attainment of which the American public took, and justly took, that strong interest which arose from a full conviction of its necessity. What would

<sup>6</sup>112 U. S. 69.

<sup>7</sup>18 Fed. 10.

be the language of a foreign government should it be informed that its merchants, after importing according to the law, were forbidden to sell the merchandise imported? What answer would the United States give to the complaints and just reproaches to which such extraordinary circumstances would expose them? No apology could be received or even offered. Such a state of things would break up commerce. It will not meet this argument to say that this state of things will never be produced; that the good sense of the State is sufficient security against it. The Constitution has not confined this subject to that good sense. It is placed elsewhere. The question is, where does the power reside? not how far will it be probably abused? The power claimed by the State is, in its nature, in conflict with that given to Congress, and the greater or less extent in which it may be exercised does not enter into the inquiry concerning its existence."<sup>8</sup>

We have so far discussed the application of the commerce clause only in its wider bearings. However, we feel the need of more; to become thoroughly acquainted with the Constitutional construction of the commerce laws of the United States, we need to understand the regulation of commerce within the States, and between the States as well. It is very difficult to draw the line precisely where the commercial power of the United States ends and the commercial power of the individual State begins, inasmuch as the State has the inherent right to tax persons and property. American authorities have had to meet such questions as the cases arose. Distinguishing landmarks have slowly been erected on each occasion, until the commercial boundary line between the authority of the United States and that of the State has now become so clear that no mistake is possible. We have learned that the State cannot impose a

<sup>8</sup>12 Wheat, 419; 7 Curtis 262.

license tax on importers, and understand the theory attached to that decision. But we are now going to learn that goods or merchandise, when imported and found within the State, are soon mingled with and become part of the property in the State. When so mingled, such goods, articles, and merchandise lose their distinctive character as an import and become properly subject to the taxing power or police power of the State; but until then the Constitutional restriction stands. So long as such imports remain the property of the importers in their warehouses in the original form and package in which they were imported, the Constitutional prohibition against the State laying any duty on imports stands.<sup>9</sup> The Supreme Court had before it an important case, very important to our present inquiry, in which the plaintiff in error was a dealer in sewing machines which were manufactured without the State of Missouri, and the dealer went from place to place in that State selling them without a license. For this offense he was indicted and convicted in one of the courts of the State. On appeal to the Supreme Court of the State the judgment was affirmed. The statute under which the conviction was had declares that whoever deals in the sale of goods, wares, or merchandise, except books, charts, maps, and stationery, which are not the growth, product, or manufacture of the State of Missouri, by going from place to place to sell the same, shall be deemed a peddler. It then enacts that no person shall deal as a peddler without a license, and prescribes the rate of charge for the license. No license is required for selling in a similar way, by going from place to place in the State, goods which are the growth, product, or manufacture of the State. The license charge exacted was sought to be maintained as a tax upon a calling. It was held to be such a tax by the Supreme Court of the State; on a call-

<sup>9</sup>12 Wheat. 419.



ing, says the court, which is limited to the sale of merchandise not the growth or product of the State.

We are aware, as before stated, of the general power of the State to impose taxes in the way of licenses upon all pursuits and occupations within its limits. But if the business or occupation consists in the sale of goods, the license tax required for its pursuit is in effect a tax upon the goods themselves. If such a tax be within the power of the State to levy, it matters not whether it be raised directly from the goods, or indirectly from them through the license to the dealer, we can see that it is in opposition to that commerce between the States which consists in the transportation and exchange of commodities, which is of national importance, and admits and requires uniformity of regulation. "The power which insures uniformity of commercial regulation," says the Supreme Court of the United States, "must cover the property which is transported as an article of commerce from hostile or interfering legislation until it has mingled with and becomes part of the general property of the country, and subjected like it to similar protection, and to no greater burdens."<sup>10</sup>

Thus, the act of Missouri was construed to be an encroachment upon the commercial power of the Federal Government, and was found, therefore, unconstitutional and void. The people of the several States have been forced to recognize the application of the same principle in several instances, although the circumstances were different according to the several localities. The act of New York, requiring the master of a vessel bringing passengers from other countries and landing them within its limits to pay to the State a certain sum per head for every such passenger, or imposing on the ship-owner an alternative payment of a small sum of money for each passenger landed, was found,

<sup>10</sup>91 U. S. 275.



as we might expect, unconstitutional and void.<sup>11</sup> The stamp duty act of California, imposing a stamp duty upon the bills of lading of all goods sent out of the State, was also invalidated.<sup>12</sup> The State of Indiana, too, has been restricted from enforcing its own law forbidding the piping of natural gas from the State.<sup>13</sup>

But here we must remember the power belonging to the State by inalienable right—the police power. It must be borne in mind side by side in connection with our study of the commercial power of the Federal Government. By virtue of its jurisdiction over persons and property within its limits, the State may provide for the security of the lives, health, and comfort of such persons. Congress declared that the State authority over intoxicating liquors coming into the State by an interstate shipment, attached only after the consummation of the shipment, but before the sale of the merchandise; that is, the one receiving merchandise of the character named, while retaining the full right to use the same, should no longer enjoy the right to sell free from the restrictions as to sale created by the State legislation.<sup>14</sup> Quite recently the Supreme Court of the United States had occasion to throw light upon this subject by upholding the State law of South Dakota which imposed a license tax on the business of selling intoxicating liquors within the State by traveling salesmen who solicited orders. “That a State,” says the Supreme Court, “may regulate and forbid the making within its borders of insurance contracts with its citizens by foreign insurance companies or other agents is certain. But that this power to prohibit does not extend to preventing a citizen of one State from making a contract of insurance in another State is also settled.”<sup>15</sup>

<sup>11</sup>7 How. 283.

<sup>12</sup>24 How. 169.

<sup>13</sup>120 Ind. 575.

<sup>14</sup>170 U. S. 412; 135 U. S. 100.

<sup>15</sup>155 U. S. 648; 165 U. S. 578; 17 Sup. Ct. Rep. 427.

We have, by the way, come at one bound from a discussion of the working of the laws concerning national and State commerce in the almost forgotten past to a consideration of these laws in modern times, omitting a discussion of the cases leading up to the present interpretation, but we may recognize the same principle throughout the entire development. Now let us go back not so very far, but as far as is necessary to consider the growth of this principle. But here the principle we are tracing becomes all the stronger. Take the Tennessee case in which the State imposed a license tax upon the salesmen who were soliciting orders for goods to be sent into Tennessee from the State of Ohio. Our readers can readily see that if such a law were constitutional, and the court so held, then the forty-six States of the United States could adopt similar legislation to suit their respective circumstances. The result would necessarily be that the commerce of the country would be thrown into the same discordant, retaliating, and chaotic confusion as under the Articles of Confederation. We know that in order to prevent such a chaotic condition of affairs our present Constitution was promulgated, by means of which the National Legislature alone is invested with the power "to regulate commerce." "The State," says the Supreme Court, "may tax its own internal commerce; but that does not give it any right to tax interstate commerce."<sup>16</sup>

We are now somewhat clear in observing the line drawn by Constitutional construction between the national and State commercial power. But we venture to enlarge upon what we think is already clear. This time we will observe from a different standpoint. Our readers, in common with every person who has traveled, know that, upon arrival in some large city, there are cabs, omnibuses, or carriages of the transfer company, which take one in and convey him as well as his baggage from the sta-

<sup>16</sup>121 U. S. 489; 128 U. S. 129.

tion at which he arrives to the station whence he will set out to continue his journey. A question naturally arises as to the position of the transfer company, whether or not such transfer company, which is in the direct and immediate service of the people of different States, is subject to the provisions of an act of Congress to regulate interstate commerce. This transfer company, however, cannot enjoy the privilege of Federal protection. Even under the latest commerce act,<sup>17</sup> this class of commerce was not included among those subject to that piece of national legislation. This distinction, however, must always be borne in mind, that transfer companies such as are noticed in large cities engaged in transportation by means of omnibuses or express wagons are exempt from national interference, while all transfer companies engaged in interstate traffic by rail or water may be included within the subject of the Congressional enactment. Borrowing the language of the Supreme Court, "If the cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also so engaged? If the cab service is interstate transportation, are the drivers of the cabs and dealers who supply hay and grain for the horse also engaged in interstate commerce? And where will the limit be placed?"<sup>18</sup>

Our readers have just learned that all transfer companies which engage by rail or water in interstate commerce may be subjected to the national power over commerce. This will suggest to the mind the necessary implication that it is constitutional for the Federal power, under the commerce clause, to enact laws concerning employer and employee engaged in interstate transportation. This in turn implies that it is constitutional for Congress to make laws relating to the hours of labor,

<sup>17</sup>June 29, 1906.

<sup>18</sup>192 U. S. 21; 7 I. C. C. 286.

and the right of the employee to belong to the labor union. This again leads to the question of the constitutionality of the child labor bill, and this in turn gives rise to the question of the constitutionality of regulating the public school system. The two latter, however, are questions that need independent discussion; that is, while we may discuss these questions in a certain measure from the national commercial point of view, we may more extensively discuss them in reference to other national powers, for both concern propositions vital to the welfare of the nation. The children of the State are the very foundation upon which depends in future generations the upholding of our republican form of government, and to them the people of the several States are bound to secure the blessings of liberty; for that very purpose the fathers of the country did "ordain and establish this Constitution for the United States." These national powers do not in the least threaten the inalienable rights of the States. On the contrary, we believe the conception expressed by the words, "indissoluble Union composed of 'indestructible States,'" is fulfilled only in the development of these powers. There are certain rights born with each individual State, which no law enacted even by its own Legislature can alienate, and which certainly could not be alienated by the Federal Legislature. We must care for these State rights, as they have been cared for by those who drafted the Charter of Liberty, as well as by those who adopted and preserved it. We do not desire to sweep away the States' rights, the rights that are the very cornerstone of local self-government, and the fountain of all prosperity, whether of the State or of the nation.

The approaching Governors' Conference in the White House seems a doubtful encroachment upon State rights. Article 1, Section 10 of the Constitution provides that "No State shall, without the consent of Congress, enter into any agreement or

compact with another State." So that Congress cannot legislate away an iota of the States' rights. Even if the Congress of the United States, by the demands of the time, consent, it would not endanger any State rights, for the State's Constitution creates the Governor, and the people can control the Executive conduct as well as the Constitution itself, as they see fit. The Governor's agreement would bring about a wonderfully strong moral influence, so strong that the U. S. Congress may legalize it on the statute book. The U. S. Congress, if it ever legislates, the subject matter must have been already within the Federal power, quite independent of the Governors' agreement. The natural resources are the vital forces of State commerce and prosperity, and to preserve them means the preservation of the State. It is the State's right to receive from its Governor information of the condition of forestry, coal, gas, oil, and iron, and, if possible, of campaign fund publicity, child labor, interstate extradition, and marriage and divorce. After all, the forthcoming Governors' Congress planned under the administration of the revered President, Mr. Theodore Roosevelt, tends to expand, not the Federal, but the State rights.

But we must be honest in the expression of our conviction, based as it is upon a reasonable recognition of the fact of American progress. The Constitution of the United States is more rigid in its terms than any other, ancient or modern, Oriental or Occidental. The time-honored Constitution of England, although termed rigid and unchangeable according to Cromwell's instrument, as well as by many other English authorities, is the most yielding and flexible constitution of all. The Constitution of Japan, to be sure, is as rigid as it can be made, and stands in theory and in practice over and above all other laws, and its force overrides and breaks all other enactments of the Legislature which tend to counteract it; but when it comes to the Im-



perial construction, the very source whence it sprung, it melts away, and becomes the most yielding of all the constitutions ever presented before the student of constitutional government. Be this as it may. Is there or has there ever been an absolutely unchangeable constitution? No constitution, rigid or yielding, flexible or inflexible, has escaped change, either through the growth or decay of the life of the institutions for which it exists.

The United States, and each individual State as well, is certainly growing, and the constitution does not exist which could stand rigid and unchangeable in the face of American development. The American people have written, are now writing, and will continue to write the best history of human progress. The constitution does not exist which can block the way of the free thought, free progress, and free development of this people. By an attempt to do so it would not only weaken itself, but also weaken the force of the growing people. If the State conscience, State growth, and State government be arrayed on one hand, and the national conscience, national growth, and national government on the other—in other words, if the State cannot or will not perform its functions so as to advance the growth of the nation of which it is an “indissoluble” part, it must yield to the nation, which will protect the generations to come, protect the people of the United States, their products, their industrial systems, and will forward American national development.

We have been treating in this chapter of one of the most delicate and perhaps one of the most essential portions of the Constitution; but there are other subjects that may, by their relations to it, constitute a part of the same discussion. Let us proceed to these other problems, from an investigation of which we shall expect to gain new light on the subject we have just been discussing.



## CHAPTER VIII

### NATURALIZATION

**F**OREIGNERS visiting this country find a population of approximately eighty millions, whose institutions of liberty stand abreast of those of other nations and peoples, whose international prestige is envied by many suitors for the favor of the civilized world, whose national life is founded on a great composite solidarity of individual excellence, and whose moral and religious ideas, arts, literature, science, social and legal structure are cemented by one great language.

But when we look back, a comparatively short time ago, to the formation of their institutions of liberty with the adoption of the Constitution in 1789, there was only a population of about three millions, including the slaves, which fact made the nation's international status very discouraging and humiliating. Let one instance suffice for illustration. John Adams, the American Envoy to the Court of Prussia, was forced to submit to the same kind of treatment at the hands of Frederick the Great as that to which a Chinese coolie landing here to-day submits at the hands of the immigration agents under the exclusion laws. What a violent contrast is here manifested in the status of the nation! But in the background of this drama of national growth, of the trials and triumphs of the American people, they may behold a distinct beacon; to follow it means history-making, and to lose sight of it means national peril. That beacon light is that will of the fathers which declares that no person can

rightly be an American citizen unless he is fitted to inherit American institutions of liberty by having ideals on an equality with those of the founders of the republic. American generations must hold it incumbent on themselves to perpetuate the laws, customs, ideas, and conceptions of the fathers by the common bond of the English language, and all persons asking to share in the great gift of the institutions of liberty must first be Americanized, notwithstanding such apparently insurmountable obstacles as differences in language.

The history of the wonderfully healthy and prosperous American advance is therefore, in great measure, written in what has been done toward solving such problems as the great influx of foreigners from different parts of Europe and the problem of the great influx of Asiatics. Let us see.

Among the most important of the powers conferred upon Congress is that in which it was empowered "to establish a uniform rule of naturalization."<sup>1</sup> Naturalization is the adoption into the national family of persons not born to citizenship, and the investing them with the rights, privileges, and immunities of citizenship. This process involves the fundamental principles underlying the American understanding of expatriation, the most progressive idea of the legal rights of man. During the American revolutionary period the so-called American fathers insisted upon and made all the world understand the principle of expatriation, that is, the right of man to change his habitation and his allegiance, until now it may be said to be practically universally recognized—the subjects of all civilized nations having exercised it and having been protected in that exercise.<sup>2</sup> This progressive principle was embodied in the act of Congress of July 27, 1868, and all the nations were called upon to read and remember that:

<sup>1</sup>Art. 1, Sec. 8, U. S. Const.

<sup>2</sup>3 Pet. 121.

“Whereas, the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in recognition of the principle, this Government has freely received emigrants from all nations, and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign states, owing allegiance should be promptly and finally disavowed: therefore, any declaration, instruction, opinion, order, or decision of any officer of the United States which denies, restricts, limits, or questions the right of expatriation is declared inconsistent with the fundamental principles of the republic.”<sup>3</sup>

Under the Constitution, Congress alone is given exclusive jurisdiction over the subject of naturalization. It is plain that when Congress has prescribed a rule, its power is exclusive, and any attempted regulation by a State would not and could not break the uniform rule of Congress. Therefore, only by conformity to the act of Congress can complete citizenship be obtained. It is true that the several States in the Union confer on aliens, after they declare their intention to become citizens, the high privileges of the election franchise. Nevertheless, let it be understood that a State, being without power over naturalization, cannot confer on aliens those privileges which the Constitution guarantees, namely, that “the citizens of each State shall be entitled to all privileges and immunities of citizens of the United States.”<sup>4</sup>

An alien may secure complete citizenship according to the acts of Congress which have been enacted from time to time. He may obtain it through birth, under the general provisions

<sup>3</sup>15 Stat. at L. 223, Ch. 249; U. S. Comp. Stat. 1901, 1269.

<sup>4</sup>Art. 4, Sec. 2, U. S. Const.

of naturalization or by virtue of being one of a people absorbed collectively by treaty.

The right of claiming citizenship by birth is well explained by Mr. Justice Gray in the case of Wong Kim Ark, a Chinaman. The question submitted to the Supreme Court for decision in this case was whether a child born in the United States of parents of Chinese descent, who at the time of his birth are subjects of the Emperor of China, but have a permanent domicile and residence in the United States, are there carrying on business, and are not employed in any diplomatic or official capacity under the Emperor of China, becomes at the time of his birth a citizen of the United States. The Supreme Court was of the opinion that the question must be answered in the affirmative. Mr. Justice Gray, in rendering the opinion of the court on the question, said: "In this or in other respects, it must be interpreted in the light of the common law, the principles and history of which were familiarly known to the framers of the Constitution."<sup>5</sup>

The fundamental essential of the common law, with regard to the question of English nationality, was birth within the allegiance, or loyalty, obedience, faith, or power of the King. This doctrine embraced all persons born within the King's allegiance and subject to his protection. Such allegiance and protection were mutual, as expressed in the maxim, *Protectio trahit subjectionum, et subjectio protectionum*, and were restricted to natural born subjects, or to those who had taken an oath of allegiance, but were applicable to aliens in amity so long as they were within the kingdom. Children born in England of such aliens were therefore natural born subjects, but the children of foreign ambassadors born within the realm or the children of alien enemies born during and within their hostile occu-

<sup>5</sup>169 U. S. 649.

pation of part of the King's dominion were not natural born subjects because not born within the allegiance, the obedience, or the power, or, as would be said at this day, within the jurisdiction of the King.<sup>6</sup> It is also to be understood that in England, should an Englishman give up his allegiance to the King and become a citizen of any foreign nation, he is required to take proper steps to become naturalized, like any ordinary applicant, in order to resume the right of English citizenship.

In Japan, any Japanese who becomes naturalized in a foreign country, either by oath of naturalization or by marriage, can resume the right of Japanese citizenship either by procuring a decree of divorce or by residence within the territories of Japan. This resumption of citizenship shall be accomplished by filing application with the Minister of the Interior.<sup>7</sup> An American woman remains an American woman and retains her American citizenship if she obtains an absolute divorce from her foreign husband, so long as she resides and intends to reside in the United States; if abroad, she must register with the American diplomatic or consular agents. The naturalized American citizen is deemed to have surrendered his allegiance if he returns and stays in the country from which he first came to the United States more than two years, or resides five years in any other country, unless he registers or reports to the American foreign representatives. In Japan, any foreigner residing continuously for five years in Japan, of more than twenty years of age, or of age in the country from which he came, of good moral character, and having property or ability so that he will not become a public charge, may become expatriated from the country of his birth and assume the citizenship of Japan. Naturalization of any person must there be announced in the official

<sup>6</sup>169 U. S. 649.

<sup>7</sup>Secs. 25, 27, Japanese Registration Law.



gazette.<sup>8</sup> By the way, what the Japanese law provides and the American law does not provide concerning naturalization is, that a foreigner in Japan who has a specially meritorious record can be naturalized by order of the Minister of the Interior without complying with any provision of the registration law. A child born of Japanese parents in a foreign country is a citizen of Japan. The American child born of American parents without the United States, if he intends to be an American citizen, will have to register or report his intention to be a citizen of the United States at the American consulate or to other authorized representatives on reaching eighteen years of age. He is further required to take the oath of allegiance on attaining his majority. It may be said that in the United States, in any question concerning the right of obtaining American citizenship, the place of birth is the first, and the lineage of the family the secondary consideration; while in Japan the lineage or family line is the first consideration, and the place of birth is of secondary importance. In Japan all matters pertaining to naturalization come under the jurisdiction of the Minister of the Interior, no matter what inalienable rights may be involved in the issue. In the United States, although the Secretary of Commerce and Labor is invested by act of Congress with authority to overrule the decisions of the Bureau of Immigration and Naturalization, to which all business relating to naturalization is committed by Congressional act, we believe the judicature has final authority whenever questions of life, liberty, and property are involved in the issue. Take, for instance, the case of Nishimura Ekiu, in which we learn that Congress might entrust the final determination of those facts to an executive officer, and if it does so, his order is due process of law; and no other tribunal, unless expressly authorized by law to do so,

<sup>8</sup>Secs. 1, 15, Japanese Registration Law.



is at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.<sup>10</sup>

Another instance is that most vital decision of the Supreme Court that the authority of the executive officer's determination upon the right of landing or expulsion of Ju Toy was final, and also in the case of Zartarian it was held that no appeal was possible from the ministerial officer's decision.<sup>11</sup>

We bow before these decisions of the Supreme Court, as we always do, with reverence. At the same time, we repeat that there are certain constitutional rights that may be involved in matters of immigration or naturalization which not the executive but the judicial department of the Government should finally decide. Whether a particular decision of the former department was authorized by Congress or not is such a right. The judicial power of the United States, which is vested in one Supreme Court, extends to all cases in law and equity arising under the Constitution, the laws of the United States, and treaties made under their authority. We present our position on these matters of immigration and naturalization in the language of the Supreme Court: "The writ of *habeas corpus* is the remedy which the law gives for the enforcement of the civil right of personal liberty."<sup>12</sup> "The jurisdiction of the court was not affected by the fact that the Collector has passed on the question of allowing the person to land, or by the fact that the treaty provides for diplomatic action in case of hardship."<sup>13</sup> Moreover, when a question arises involving the validity of a distress warrant issued by the Solicitor of the Treasury, and when it was claimed that the requirement of a judicial trial does not extend to every case, Mr. Justice Curtis said: "To avoid misconstruction upon so grave a subject, we think it proper to state that

<sup>10</sup>142 U. S. 660.

<sup>12</sup>108 U. S. 556.

<sup>11</sup>198 U. S. 253.

<sup>13</sup>124 U. S. 621.

we do not consider Congress can either withdraw from judicial cognizance any matter which from its nature is the subject of a suit at common law, or in equity, or in admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."<sup>14</sup> We close this debatable question as to the comparative powers of ministerial and judicial tribunals in the language of the Supreme Court: "Undoubtedly where life and liberty are involved, due process requires that there shall be a regular course of judicial proceedings, which imply that the party to be affected shall have notice and an opportunity to be heard."<sup>15</sup>

Among the provisions of the naturalization law, the one giving rise to most discussion and doubt as to its constitutionality seems to be the following:

"The provisions of this title shall apply to aliens (being free white persons) and to aliens of African nativity and to persons of African descent."<sup>16</sup>

The question as to the real meaning of this provision became more important when a Chinese made an application to the Circuit Court of the United States for naturalization, and the court denied the application on no other ground than that a Chinese belongs to the Mongolian race, and is not a "white person" within the meaning of the provision of the statute above referred to.<sup>17</sup> Because the term "white person" has nothing to do with a particular race, and because Congress later enacted a law which, if the Circuit Court was right, would have been a needless enactment, makes it questionable whether the court was right as to the meaning of the provision. This act reads: "That hereafter no State court or court of the United States

<sup>14</sup>18 How. 272.

<sup>15</sup>111 U. S. 701-708.

<sup>16</sup>Rev. Stat. Sec. 2169; U. S. Comp. Stat. 1901, 1333.

<sup>17</sup>5 Sawy. 155.

shall admit Chinese to citizenship, and all laws in conflict with this act are hereby repealed.”<sup>18</sup> The Supreme Court made a final statement as to the naturalization rights of the Chinese when it said: “They (the Chinese) have never been allowed by our laws to acquire our nationality.”<sup>19</sup> Still, how far the provision discussed serves to open up the race question and produce race prejudice is not determined, although the Chinese rights thereunder are undoubtedly settled.

One Saito, a Japanese, was denied the right to become naturalized by the Circuit Court of the United States for the District of Massachusetts, and the application of one Yamashita was also denied on the same grounds as given in the Saito case.<sup>20</sup> But as to Japanese eligibility for citizenship, not one case has been decided by the Supreme Court of the United States. There is no provision declaring the Japanese ineligible for citizenship in any of the statutes of the United States. On the contrary, it has been understood in the diplomatic department of the United States, since the Japanese school question, that the Japanese are not of the Mongolian race. But an authoritative American work, which was recently made public, emphasizes the doubtful nature of their position when it says: “It was claimed in the recent controversy caused by the exclusion of Japanese from San Francisco schools that the Japanese are not Mongolians. But, as it does not appear to be claimed that they belong to either the Caucasian or African race, it is not seen that they are placed in any better position under our statute.”<sup>21</sup>

Ricardo Rodriguez, a citizen of the Republic of Mexico, in 1897 filed with the United States District Court an application by which he sought to become a citizen of the United States.

<sup>18</sup>22 Stat. at L. 61, Ch. 126, Sec. 14, U. S. Comp. Stat. 1901, 1333.

<sup>19</sup>169 U. S. 649; 149 U. S. 716.

<sup>20</sup>62 Fed. Rep. 126; 59 L. R. A. 671; 70 Pac. 482.

<sup>21</sup>Van Dyne, *Law of Nat.* p. 44.

This case made what was already an extremely doubtful situation even more confused, though at the same time we are convinced of the court's remarkably impartial and sound construction of the law in question. As Judge Maxey, rendering the opinion of the court, said, this case "is for the first time, so far as the court is advised, submitted for judicial determination." Judge Maxey, speaking of the applicant, well said that "if the strict scientific classification of the anthropologist should be adopted, he would probably not be classified as white. It is certain that he is not an African, nor a person of African descent. Being, then, a citizen of Mexico, may he be naturalized according to the law of Congress? Though debarred by the strict letter of the law from receiving letters of citizenship, if he is embraced within the meaning and intent of the law, his application should be granted, notwithstanding the letter of the statute may be against him."<sup>22</sup>

To be fair to all concerned, we ask: Is it not a fact that when the term "free white person" was inserted in the original act of naturalization, it was done for the sole purpose of withholding the right of citizenship from the black or African race and from the Indian race then inhabiting this country? Later, when Lincoln's proclamation of emancipation was made, and after the Fourteenth and Fifteenth Amendments were added to the Constitution, this whole naturalization law was altered to read as we have quoted: "The provisions of this title shall apply to aliens (being free white persons) and to aliens of African nativity and to persons of African descent." Is it not a fact that the provision, in the strict letter as well as in the intent and spirit of the law, has no bearing whatever upon the Mongolian race? Many nations of the world have entered into treaties with the United States, under which the high contracting par-

<sup>22</sup>81 Fed. 337.

ties agreed that the citizens of each country represented could be naturalized in another country. Among these nations are Austria-Hungary, the Grand Duchy of Baden, the kingdoms of Bavaria, Belgium, Denmark, Great Britain, the Republic of Haiti, the North German Confederation, Sweden and Norway, and the Kingdom of Wurtemberg. We are constrained to point out that there are in these countries many persons who are neither white nor African, and yet under the treaty such persons have been and are to be granted the rights and privileges of American citizens.

Most salutary legislation, however, was passed by Congress in the act of June 29, 1906, and of March 2, 1907. The most conspicuous provision of those acts is the express requirement that the applicant shall be able to write his name and speak the English language before admittance to citizenship. We would here express our appreciation of the efforts made by President Roosevelt, Secretary Root, Secretary Straus, and many other eminent men in behalf of this legislation.

The test of the naturalization rights and privileges of foreigners should not be race or color, but peaceableness, industry, and good moral character. Above all, the applicant should be able to read the Constitution and laws written in the English language, and to give satisfactory proof of his understanding of them in his examination by the court. In this way the structure of American political life, with its composite nationality, may be preserved without detriment to the end, and, notwithstanding the variety and complexity of the unseen factors of growth and the demands of an ever growing and changing economic and industrial life, Americans may be able to successfully perpetuate the grand idea of the founders of the republic.

Instances of collective naturalization by treaty or by statute are numerous. By the Indian treaty of September 27, 1830,



such tribes as the Choctaws were made citizens of the United States. All white persons of European descent who were born in any of the colonies or resided therein before 1776 were by declaration invested with the privileges of American citizenship. Under the second article of Jay's treaty, British subjects who resided at Detroit before and at the time of the evacuation of the Territory of Michigan, and who continued to reside there afterwards without at any time prior to the expiration of one year from such evacuation declaring their intention of becoming British subjects, became *ipso facto* to all intents and purposes American citizens. By Article III of the Treaty of Paris, and 8 Statute 200 and 202, which was enacted in pursuance of the treaty, inhabitants of the ceded territory were admitted to citizenship. After the treaty of 1803 was made, and before the State of Louisiana was admitted into the Union, it was held that any one being an inhabitant thereof at the time of admission became a citizen of the United States by that fact on the ground that he was one of the inhabitants contemplated by the third article of the treaty of purchase, which article referred to all the inhabitants embraced within the new State.

There is one other mode of naturalization. If any alien should die without having completed his naturalization, his widow and children would be considered citizens. This point was made clear in the famous Governor-elect Boyd's case, as explained in the opinion of Chief Justice Fuller.<sup>23</sup> This method of naturalization was also embraced in the new naturalization law to which we have already referred.

Foreigners who come to America must understand that while they enjoy the same rights as American citizens enjoy under the Constitution and laws of the States and of the United States, they enjoy no more than that. It may be said that a

<sup>23</sup>143 U. S. 135.



nation has supreme authority over its citizens or subjects when within its boundaries, and also a certain authority over them when abroad. But the claims of the latter authority must be limited simply to the matters which are expressly provided for by the treaty.

Foreigners in the United States, unless under special and express stipulations, must not hold the foolishly inflated notion that they are protected in their rights under a double authority, that of the American laws and that of the laws of their native country. It is too much for any foreigners to expect that their rights should be thus protected, even if certain portions of the treaty were given such a construction by implication. We should give the treaties a liberal construction, we recognize that treaties are a part of the supreme law of the land; but any nation whose standing equals ours, and whose civilization is a civilization under the majesty of law, should have known when making a treaty with this country that the Constitution of the United States is the paramount authority over the State constitutions, laws, and even over treaties. The American Constitution created the judicial department of the Government, and through it guarantees all persons found within the borders of the country—citizens or aliens—the equal protection of life, liberty, and property. We have been provoked of late by coming across the claims of certain foreigners, Italians and others, that they have guaranties of the protection of their rights in America under the terms of their country's treaty and under the American law according to their own judgment of the same. If such claims could stand, then constitutional government, especially one like the American, which is the very breath of modern civilization, would amount to an open mockery.

After all, there is one principle, whether noted in the past or in the present—one principle only which we must keep in

mind with regard to the question of naturalization and citizenship. "Jurisdiction of the nation within its own territory is necessarily conclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it deriving validity from an internal source would imply a diminution of its sovereignty to the same extent over that power which could impose such restrictions. All exceptions, therefore, to the full and complete power of a nation within its own territories must be traced up to the nation itself; they can flow from no other legitimate source."<sup>24</sup>

In discussing expatriation, emigration, naturalization, and citizenship, the recognition of the right of autonomy or the regulation of its own internal affairs by a particular sovereignty must be the first principle, and no departure from this principle is admissible. The Constitution of the United States has no extra-territorial effect, no more than have the constitutions of other nations.

We conclude our discussion with the opinion of Mr. Justice Field in the Chinese exclusion case: "If, therefore, the Government of the United States, through its legislative department, considers the presence of foreigners of a different race in this country, who will not assimilate with us, to be dangerous to its peace and security, their exclusion should not be stayed at the time when there are no actual hostilities with the nation of which the foreigners are subjects. The existence of war would render the necessity of the proceeding only more obvious and pressing. The same necessity, in a less pressing degree, may arise when war does not exist, and the same authority which adjudges the necessity in one case must also determine it in the other. In both cases its determination is conclusive upon the judiciary."<sup>25</sup>

<sup>24</sup>7 Cranch. 116, 136.

<sup>25</sup>130 U. S. 581-606.

## CHAPTER IX

### BANKRUPTCY

**S**UCCESS in trade requires investigation of failure in trade. Without the poor, there would be no rich. A little more than one hundred years ago, one of the noted economists said that it was a maxim of public policy that only one party to trade could profit by a transaction, and that all which one party might gain the other must lose. It may be true that mankind has made greater progress towards humane relations during the last century, yet it may also be said with truth that so long as we are human—however high our ideals may be—this time-honored maxim, that all which one party might gain the other must lose, does and will set man against man, making the intercourse of even the most civilized persons a game of deceit. The framers of the American Constitution, therefore, invested in Congress the power, not only to regulate commerce and naturalization, but also the power to “establish uniform laws on the subject of bankruptcy throughout the United States.”

A bankrupt originally meant a trader who secreted himself or did certain other acts tending to defraud his creditors. The word is derived from the Italian *Banco rota*, the custom being in the Middle Ages to break the benches or counters of merchants who failed to pay their debts. Bankruptcy and insolvency, as they are generally understood, the one emanating from the Federal laws, the other from State legislation, have often

been the cause of controversies in the American courts. In England, prior to the passage of the English bankruptcy act, there was a distinction between bankrupts and insolvents. The use of the former term seemed to be limited to traders. In the United States also there were some such distinctions between the two, according to the bankruptcy laws. So it is in Continental Europe, where still exist the laws which expressly distinguish bankrupts from insolvents. The similarity of terms in the bankruptcy laws of England and America may be discerned, except in a few instances.

But we have in America another feature of the laws relating to bankruptcy, which is more important and therefore more discussed than the so-called distinction of bankrupts from insolvents, even more important than the substance of the laws themselves. The question relating to bankruptcy which has been most discussed in America is the very same question that was answered by Chief Justice Marshall himself. The question was "Whether, since the adoption of the Constitution of the United States, any State has authority to pass a bankrupt law, or whether the power is exclusively vested in the Congress of the United States?" The answer of the noted jurist was: "It is totally unnecessary to consider the question whether the law of New York is or is not a bankrupt law. We proceed to the great question on which the cause must depend. Does the law of New York, which is pleaded in this case, impair the obligation of contracts within the meaning of the Constitution of the United States?"<sup>1</sup>

What is the obligation of a contract and what will impair it? In the language of Chief Justice Marshall, "It would seem difficult to substitute words which are more intelligible, or less liable to misconstruction, than those which are to be ex-

<sup>1</sup>4 Wheat. 122-192.

plained." A contract is an agreement in which a party undertakes to do, or not to do, a particular thing. The law binds him to perform his undertaking, and this is, of course, the obligation of his contract. The first one of the most important decisions rendered by Chief Justice Marshall was in the case of *Sturges vs. Crowninshield*, in which the defendant had given his promissory note to pay the plaintiff a sum of money on or before a certain day. The contract bound him to pay that sum on that day, and this was its obligation. Any law which releases a part of this obligation must, in the literal sense of the word, impair it. Much more must a law impair it which makes it totally invalid and entirely discharges it. The words of the Constitution, then, are express and incapable of being misunderstood. Yet we have the opinion that this law is not within the prohibition of the Constitution, and that, as a contract can only bind a man to pay to the full extent of his property, it is an implied condition that he may be discharged on surrendering the whole of it. Such opinions have often been entertained by prominent persons, and, however misleading they may be, without them we would have no opportunity for further discussion of the subject. Have the parties to the contract only the property in possession when the contract is formed in view, so that its obligation does not extend to future acquisitions? Industry, talent, and integrity certainly constitute a fund which is as confidently trusted as the property itself; therefore, future acquisitions are liable under the contract. To release them from this liability is to impair their obligation, is it not? The Constitution neither grants nor prohibits to the State the power of passing bankruptcy laws, but finds them in possession of the power. However, there are many who insist that although all legislative acts which discharge the obligation of a contract without performance are within the prohibition of the Constitution,



yet an insolvent act, containing the same principle, is not within the spirit of the prohibition. Such acts have been passed by colonial and State legislatures from the first settlement of the country, and because we know from the history of the time that the mind of the Convention in adopting the prohibition was directed to other laws, which were fraudulent in their character, which enabled the debtor to escape from his obligation, and yet hold his property, and not to an insolvent act, which is beneficial in its operation. The argument that the spirit of the Constitution is to be gathered chiefly from its words is dangerous in the extreme. We should remember that, in any case, if the plain meaning of a Constitutional provision is to be disregarded merely because we believe the framers of that instrument could not have intended what they say, it must be a case in which the absurdity and injustice of applying the provision would be so monstrous that all mankind would without hesitation unite in rejecting the application.

The American understanding of this specific power of Congress was clearly made known, and the principles upon which such understanding rests were pointed out on several occasions. Take the case of *Ogden vs. Saunders*, and we will see the three important rules. First, the power of Congress to establish uniform laws on the subject of bankruptcy throughout the United States did not exclude the right of the State to legislate upon the same subject except when the power was actually exercised by Congress and the State laws conflicted with those of Congress. Secondly, a bankrupt or insolvent law of any State which discharges both the person and his future acquisitions of property from the debt is not a law impairing the obligation of a contract as respects debts entered into subject to the passage of such laws. Thirdly, a certificate of discharge under such a law cannot be pleaded in bar of an action brought by a citizen of any



other State than that in which the discharge is obtained. Next, we will take up the case of *Baldwin vs. Hale*. Baldwin executed at Boston, in the State of Massachusetts, his promissory note for two thousand dollars, payable there to his own order, and subsequently indorsed such note to Hale. Subsequently, Baldwin had a certificate of discharge in an insolvency proceeding in the courts of Massachusetts, which certificate embraced by its terms all contracts to be performed within that State. At the time of the execution of the note and the commencement of the proceeding, Hale was a citizen of Vermont and Baldwin of Massachusetts. Baldwin pleaded the certificate of the State insolvency court as a bar to the action, but the United States Circuit Court in which the case was instituted did not sustain Baldwin's contentions. Hence the writ of error for the determination of the United States Supreme Court, upon which Justice Clifford rendered the opinion that insolvent laws of one State cannot discharge the contracts of citizens of other States, because they have no extra-territorial operation, and consequently a tribunal sitting under them, unless in cases where a citizen of such other State voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no legal default.<sup>2</sup> This decision, later on, was upheld in similar succeeding cases as a clear and accurate presentation of the true doctrine. Mr. Justice Miller thus expressed it: "In other words, whatever the court before whom such proceedings are had may do with regard to the disposition of the property of the debtor, it has no power to release him from the obligation not personally subjected to the jurisdiction of the court. Any one who will take the trouble to examine all these cases will perceive that the objection to the extra-territorial operation of a State insolvent law is, that

<sup>2</sup>1 Wall. 223.

it cannot, like the bankruptcy law passed by Congress under its Constitutional grant of power, release all debtors from the obligation of debt.”<sup>3</sup>

We have quoted the language of Chief Justice Marshall, that it is unnecessary “to consider the question whether the law of New York is or is not a bankrupt law,” but whether such law would “impair the obligation of contracts” within the meaning of the Constitution. Congress in making the laws, and the Federal courts in construing the laws and the Constitution, as a unit have maintained and will maintain to the last that we should not impair the obligation of contracts. Among the many provisions of the Constitution, we have as yet come across none more important and salutary than this one which we have been discussing. We venture to say that if such provisions are enforced in a country where a few aristocrats control the execution of the law, then the law whose very purpose is to preclude the repudiation of debts may serve to protect and perpetuate evil designs. The provisions in this country do not operate like those in England, where the Parliament has omnipotent power, or like those in Japan, where there is a higher authority over and above the laws and Constitution, in which countries it might be said that the act of Parliament or the decree of the Emperor is both the law and the contract, and therefore subject to modification or repeal. But in the United States, where the equality of man and man reaches such an extreme that it often suggests radical democracy or even socialistic radicalism, this specific provision and its construed principles as handed down to us are the bulwark of American individualism itself.

<sup>3</sup>128 U. S. 489; 4 Wall. 409; 7 N. Y. 500; 100 Mass. 87; 37 Cal. 222; 4 Wheat. 518.

## CHAPTER X

### MONEY

**C**ONCERNING this subject, we must find the source of our discussion in the Constitution, where it says that "Congress shall have power to coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures"; and again, "No State shall coin money, emit bills of credit, or make anything but gold and silver coin a tender in payment of debts."<sup>1</sup> Our understanding of the word "money," here, is based upon the Constitutional construction of the word and not upon the interpretation given it by teachers of political economy.<sup>2</sup> At the time of the framing and adoption of the Constitution of the United States the Congressional power of borrowing money and issuing bills or notes of the Government for money borrowed and of impressing upon those notes or bills the quality of being a legal tender for the payment of private debts was a power universally understood in Europe and America to belong to sovereignty. The governments of Europe vested this power of issuing paper money and stamping coin in the monarch or the legislature, according to

<sup>1</sup>Art. 1, Secs. 8, 10, U. S. Const.

<sup>2</sup>Continental economists nearly all agree that the value of money has been adopted by general consent to express our wants and our property, as letters were invented to express our ideas.

J. S. Mill says: "Money performs three distinct services, namely, a common measure, or common denominator of value, a medium of exchange, a standard of value."

According to Walker, money is the medium of exchange. Whatever performs this function, or does this work, is money.

the distribution of powers under their respective constitutions. This fact was emphasized in the important case where the Emperor of Austria, as King of Hungary, obtained from the English Court of Chancery an injunction against the issue in England, without his license, of notes purporting to be public paper money of Hungary.<sup>3</sup> The power of issuing bills of credit and of making them, in the discretion of the Legislature, a tender in payment of private debts, had long been exercised in America among the several colonies. During the Revolutionary War the States, upon the recommendation of the Congress of the Confederation, made the bills issued by the Congress a legal tender.<sup>4</sup> On this point, Mr. Justice Strong rightly observed: "Every contract for the payment of money, simply, is necessarily subject to the Constitutional power of the Government over the currency, whatever that power may be, and the obligation of the parties is therefore assumed with reference to that power." The jurist went on to say: "I have been asked whether Congress can declare that a contract to deliver a quantity of grain may be satisfied by the tender of a less quantity. Undoubtedly not. But this is a false analogy. There is a wise distinction between a tender of quantities, or of specific articles, and a tender of legal values. Contracts for the delivery of specific articles belong exclusively to the domain of State legislation, while contracts for the payment of money are subject to the authority of Congress, at least so far as relates to the means of payment. They are engagements to pay with lawful money of the United States, and Congress is empowered to regulate that money."<sup>5</sup>

It is now settled beyond question that Congress has the exclusive power to incorporate national banks. It is also settled

<sup>3</sup>2 Giff. 628, and 3 D. F. v. T. 217.

<sup>4</sup>110 U. S. 421.

<sup>5</sup>12 Wall. 457.

beyond question that the national banks, for their own benefit as well as for the use of the Government in its money transactions, may issue bills which under ordinary circumstances pass from hand to hand as money at their face value, and which, when so current, the law has always recognized as a good tender in payment of money debts, unless specifically objected to at the time of tender.<sup>6</sup> That the power to regulate carries the power to change the value there can be no doubt, and neither is there doubt that the value of the money metals changes from time to time. It is unquestionably proper and constitutional to change the legal ratio of the intrinsic values in order to conform to the market ratio. But to change the legal ratio for reasons other than here stated, or to change it so as to upset the legal value of all existing credits, would be not only tyrannical, but entirely out of reason. The States, in the exercise of their own sovereignty, may determine for themselves in what currency the people within the respective States shall pay their taxes; and private parties in their contracts may determine for themselves in what currency they shall pay in discharging their contracts. But neither States nor private parties should confuse those rights by a denial of the power of Congress to enact laws making Treasury notes legal tender.<sup>7</sup>

Having undertaken, in the exercise of undisputed constitutional powers, to provide a currency for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of laws thereon to the people by further legislation. To this end, Congress has denied the quality of legal tender to foreign coins, and has provided by law against the imposition of counterfeit and base coin on the community. To the same end, Congress may restrain the circulation of any note as money which is not issued under its own authority. Without

<sup>6</sup>10 Wheat. 316.

<sup>7</sup>7 Wall. 71; 7 Wall. 229; 12 Wall. 687.

this power any attempt to secure a sound and uniform currency for the country must be futile.<sup>8</sup>

Now as to counterfeiting. We have concluded that the power of coining money and of regulating its value was delegated to Congress by the Constitution for the purpose of creating and preserving the uniformity and purity of the standard of value. We have concluded that this power was given to Congress on account of the impossibility, which was foreseen, of otherwise preventing the inequalities and confusion necessarily incident to the different monetary views of different communities. Then we can at once see that that power must carry with it the correlative power of "protecting the creature and object" of that power. It is unreasonable to suppose for one moment that, having given this high and exclusive authority to Congress, the power of Congress to secure the objects of that authority would be withheld. Yet this power, like every other power of Congress, has not been without some legal contentions, all of which contentions have resulted in the formation of our constitutional law, and have made these powers more clearly understood in each instance. If the circulating medium which the Government authorized could immediately be expelled, and replaced by one it had not authorized—one possessing no intrinsic value—then the power conferred by the Constitution would be useless, wholly fruitless of every end it was designed to accomplish. We admit that the clause of the Constitution authorizing Congress to provide for the punishment of counterfeiting the securities and current coin of the United States does not embrace within its language the offense of uttering or circulating spurious or counterfeited coin.<sup>9</sup> We do not think it

<sup>8</sup>8 Wall. 549; 101 U. S. 1-6.

<sup>9</sup>The term "counterfeit," both by its etymology and common intendment, signifies the fabrication of a false image or representation.



necessary or regular to seek the origin of the offense of circulating spurious coin or the origin of the right to punish that offense. We trace both the offense and the authority to punish it to the power given by the Constitution to coin money and to the resulting necessary power and obligation to protect and preserve in its purity this constitutional currency for the benefit of the nation. The Supreme Court, to which we owe the exposition of this interpretation, had this to say: "Whilst we hold it a sound maxim that no powers should be conceded to the Federal Government which cannot be regularly and legitimately found in the charter of its creation, we acknowledge equally the obligation to withhold from it no power or attribute which, by the same charter, has been declared necessary to the execution of expressly granted powers and to the fulfilment of clear and well-defined duties."<sup>10</sup>

A thorough discussion of the money power of Congress naturally involves an inquiry into regulations concerning the "standard of weights and measures," which Congress is also empowered by the Constitution to determine. There is no question as to the exclusive power of Congress on this subject. But this power, too, has been construed time and again, and in these constructions we find most interesting matter for study. While the Congressional power on this subject is undoubted, yet it must be remembered that the mere grant of this power to Congress does not extinguish the inherent State power on the subject if the power is not exercised by Congress. The conclusion we at once reach upon seeing that a certain power is granted to Congress, that the power of the State on that particular point is obliterated, is erroneous. Such a conclusion is contrary to the rule of constitutional construction adopted by all approved authorities. Alexander Hamilton, who was not likely to relin-

<sup>10</sup>5 How. 410; 132 U. S. 131.

quish a claim of Federal authority where he could maintain it with any show of reason, thus states the rule: "This exclusive delegation, or, rather, this alienation of the State sovereignty, exists only in three cases: First, where the Constitution in express terms granted an exclusive authority to the Union; second, where it granted an authority to the Union and at the same time prohibited the States from exercising the like authority; third, where it granted an authority to the Union to which a similar authority in the States would be absolutely and totally contradictory and repugnant."

The State sovereignty as regards this subject must therefore be overruled by implication, if at all. But such implication can be given effect only where the State authority is absolutely and totally contradictory and repugnant "to the power delegated to Congress." These words necessarily imply the pre-existence of something to contradict or oppose. But there is nothing whatever, either in the Constitution or in the acts of Congress, which an act of a State Assembly relating to weights and measures in any respect contravenes or opposes. It is, therefore, perfectly constitutional for a State to enact such a law. As Judge Tilghman said, "Where the authority of the State is taken away by implication, it may continue to act until the United States exercise their power, because, until such exercise, there can be no incompatibility."<sup>11</sup>

In every State of the Union the standard of weights and measures has been constantly governed either by a State statute or by the common law of the State. The power of each State to establish its own common law on this subject has never been denied. Its right to do so, until Congress shall act on the subject, admits of no doubt.

<sup>11</sup>3 S. & R. 179; 5 Wheat. 1-49.

## CHAPTER XI

### POST ROADS AND THE HIGH SEAS

WE have been fortunate in tracing our way in our study of the Constitution and pursuing our search into the American understanding of the principles of individual and national growth. We shall next attempt to investigate what may be called a correlative cause of the American advance, the development of means of communication. The power of Congress to enact laws organizing, managing, and controlling post-offices and post roads in the United States has never been subject to question, because it was expressly conferred upon it by the Constitution.<sup>1</sup> However, incidental matters connected with this subject do give rise to questions, to answer which a clear understanding of this particular power is necessary.

Every road within a State or Territory, including railroads, canals, turnpikes, and navigable waters, existing or created within a State by national legislation, becomes a post road.<sup>2</sup> The power vested in Congress to establish post-offices and post roads embraces the regulation of the entire postal system of the country, and under it Congress may designate what may be carried in the mail and what excluded. In excluding various articles from the mails, the object of Congress is not to interfere with the freedom of the press or with any other right of the people, but to refuse the facilities of the mail for the distribution of matter deemed by Congress injurious to the public morals. The

<sup>1</sup>Art. 1, Sec. 8, Const.

<sup>2</sup>10 Wall. 454.

transportation in another way of matters excluded from the mails would not be forbidden.<sup>3</sup> We are sure that whatever place is officially kept as a place of deposit of mailable matter is a post-office, though it be merely a desk, or a trunk, or a box carried about a house or from one building to another.<sup>4</sup> But the top of a letter-box is not an authorized depository for mailed matter.<sup>5</sup> When goods are sent by mail, the post-office is the agent, not of the seller, but of the buyer, and when goods are delivered by the seller to the post-office, the title of such goods is vested in the buyer. The power to establish post-offices does not enable the Postmaster-General to bind the Government by leasing a post-office for twenty years when there is no appropriation therefor.<sup>6</sup> All the streets of a city are post roads, because they are letter-carrier routes, as are all public roads and highways while kept up and maintained as such. Most of the criminal legislation of Congress in this respect rests upon no express grant of power, but upon the power to make all laws necessary and proper for carrying into execution the powers conferred. In order to constitute an offense against such criminal legislation, the mail matter must have been in the custody of the postmaster or his agents.<sup>7</sup>

A labor union may be found guilty of criminal conspiracy against the Government if it causes actions tending to delay a train carrying the mails, though such actions merely consist in quitting the service of an employer.<sup>8</sup> It is an obstructing of the mail and an offense for one to enforce a lien which he may have against a horse or vehicle while such horse or vehicle is actually being used in carrying mail. It is an obstruction of the mail

<sup>3</sup>95 U. S. 727.<sup>4</sup>2 Blatch. 108.<sup>5</sup>17 Op. Atty.-Gen. 524.<sup>6</sup>155 U. S. 489.<sup>7</sup>20 Fed. Rep. 625. (The United States may enjoin the maintenance of obstructions upon railroads and electric railways that carry mail.)<sup>8</sup>I. S. C. Act 1887; A. T. Act 1890; 55 Fed. Rep. 380.

and an offense for one to commit an unprovoked assault upon a postmaster or his agent unless the act was independent and unconnected with matters pertaining to the post-office, because it retards the passage of the mails.<sup>9</sup> Restricting the speed of trains to six miles an hour by city ordinance or restraining the driver of a mail coach in a crowded city from driving at such a speed as seriously endangers the lives of the citizens is not an obstruction of the mails, but it is an offense to stop a mail train by a State court writ of judgment.

*In re the Rapier* case, Chief Justice Fuller clearly explained this incidental power of Congress over the postal service. The distinguished American jurist said that the States, before the Union was formed, could establish post-offices and post roads, and in doing so could bring into play the police power in the protection of their citizens from the use of the means provided for purposes supposed to exert a demoralizing influence upon the people. When the power to establish post-offices and post roads was surrendered to Congress it was a complete power, and the grant carried with it the right to exercise all the powers which made that power effective. The argument that there is a distinction between *mala prohibita* and *mala in se*, and that Congress might forbid the use of the mails in promotion of such acts as are universally regarded as *mala in se*, including murder, arson, burglary, etc., and the offense of circulating obscene books and papers, but cannot do so in respect to other matters which it might regard as criminal or immoral, but which it has no power itself to prohibit, involves a concession which is fatal to the contention of the petitioners, since it would be for Congress to determine what are within and what are without the rule; but we think there is no reason for such a distinction here, and that it must be left to Congress, in the exercise of a sound

<sup>9</sup>14 Fed. Rep. 127.

discretion, to determine in what manner it will exercise the power it undoubtedly possesses. We cannot regard the right to operate a lottery as a fundamental right infringed by the legislation in question, nor are we able to see that Congress can be held, in its enactment, to have abridged the freedom of the press. The circulation of newspapers is not prohibited, but the Government declines to become an agent in the circulation of printed matter which it regards as injurious to the people. Freedom of communication is not abridged within the intent and meaning of the Constitutional provisions unless Congress is absolutely destitute of any discretion as to what shall or shall not be carried in the mails and compelled arbitrarily to assist in the dissemination of matter condemned by its judgment, through the government agencies which it controls. That power may be abused furnishes no ground for a denial of its existence, if government is to be maintained at all.<sup>10</sup>

In the United States, reform and reorganization for the improvement of the postal system are as progressive as the growth of commerce and population. The postal system is sometimes at the head of these two sister factors, serving, as it does, as the advance courier of the national progress. New arrangements in the postal system have been made and are being made almost as rapidly as the rate of speed of locomotives increases. The maximum weight has been raised both as to domestic and foreign mail matter, and it is now being proposed that it shall be still further raised. Following the rural free delivery, a movement for a parcels-post system at a lower rate than that of the general system is being inaugurated. With cheap rates and heavy packages, both city merchants and farmers can participate in the benefits of the system to an unknowable degree. The farmer may order by telephone and get his goods as quickly

<sup>10</sup>143 U. S. 110.



and safely as the Government is able to send them. The theory is that the majority of the people would receive the benefit, and the strenuous age seems not to consider the individual loss of the few who engage in the express or transportation business. The American idea of "cheapest-rate-heavy-package-and-quick-delivery" does not confine itself to America, but it seems to have a tendency to spread into foreign countries. The American Postmaster-General proposes that all nations should reduce the rate and increase the maximum weight on parcels sent to any one of the twenty-two foreign countries which have joined the Parcels Post Union.<sup>11</sup>

In view of the ever increasing importance to the world of regular and inviolable communication, it may be of interest to study what may become of our mail on the high seas when we or some other nation or people are at war. The conveying of hostile dispatches implies guilt on the part of the carrier, but it must not be confused with the carriage of the mails. A presumption of guilt in case of the mail-carrier cannot be entertained by belligerents or neutrals, and so they must not obstruct the passage of mails in the way of original business. The United States, during its Civil War, made all the world understand that mail-bags, whether suspicious or not, must not only be left unopened, but must be forwarded to their destination without molestation. Notwithstanding that there was reason to believe in the questionable use made of the mails, one of the greatest of American diplomats, if not the greatest one, Secretary Seward, wrote to Mr. Adams that "the President believes it is not less desirable to Great Britain than it is to the United States and other maritime powers to arrive at some regulation that will at once save the mails of neutrals from unnecessary interruption and exposure." The modern tendency is to facilitate

<sup>11</sup>Postmaster-General's recommendations to Congress, 1907.

mail communication in every way possible, to remove every obstacle to its prompt and safe delivery, and to guarantee, beyond question, the sacredness of private correspondence.<sup>12</sup>

In this connection, let us remember that the United States achieved a great historical success in the problems of international mail communication in the case of Japan. Japan, up to 1872, had all her foreign mail business transacted through the postal agencies of Great Britain, France and the United States, stationed in the ports of Yokohama, Kobé and Nagasaki. The United States entered into an agreement, establishing a precedent in this matter by the treaty which began operation under date of January 1, 1875, and under which Japan, for the first time, began the direct exchange of mail matter with foreign countries. On this memorable day the post-offices of the United States in Japan closed, and those of other nations followed suit. This event was the keynote which led Japan to become a member of the International Postal Union held in Paris in 1878. But Japan is not the youngest member of the Union, for there are at present about fifty-eight countries on the list of the Postal Union, and of that number thirty-two joined after Japan had been admitted into it. And it will be remembered that there are only twenty-three countries that are members of the International Parcels Post Union.

What is the meaning of the "high seas" under the Constitution? Although independent and unconnected with the Constitutional provision upon post roads, nevertheless it is an important study in connection with that concerning post roads. As we all know, by "high seas," as by post roads, in the present advanced stage of international correspondence, is understood

<sup>12</sup>Dana's *Wheaton*, p. 660; Bernard's *Neut. of Gt. Britain*, 319; Taylor's *Int. Pub. Law*, p. 751; Field, *Int. Code*, Sec. 862; G. B. Davis, *Ele. of Int. Law*, p. 463.

necessarily a highway which is common to all and open to be freely used by the public.

Spaniards, during the sixteenth century, asserted the right to exclude all others from the Pacific Ocean. So the Portuguese, under the grant of Pope Alexander VI, claimed the exclusive use of the Atlantic Ocean, west and south of a designated line. The English, too, in the seventeenth century, claimed the exclusive right to navigate the seas surrounding Great Britain.<sup>13</sup> "The sea is that which lies within the body of a country, or without," says Sir Matthew Hale; "that arm or branch of the sea which lies within the *fauces terrea*, where a man can reasonably discern between shore and shore, is, or at least may be, within the body of the country, and therefore within the jurisdiction of the sheriff or coroner. That part of the sea which lies not within the body of a country is called the main sea or ocean." By the "main sea," Hale here means the same thing expressed by the term "high sea," "*mare altum*" or "*le haute mer*."<sup>14</sup> The United States Supreme Court on this "high sea" question states: "If there were no seas other than the ocean, the term 'high sea' would be limited to the open, unenclosed waters of the ocean, but as there are other seas besides the ocean, there must be high seas other than those of the ocean. A large commerce is concluded on seas other than the ocean and the English seas, and it is equally necessary to distinguish between their own waters and their ports and havens and to provide for offenses on vessels navigating those waters and for collisions between them. The term 'high seas' does not in either case indicate any separate and distinct body of water, but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands on the coast. In that sense the term may be properly used in reference to the open

<sup>13</sup>150 U. S. 249.

<sup>14</sup>De Jurie Maxis, C. IV.

waters of the Baltic and the Black Sea, both of which are inland seas, finding their way to the ocean by a narrow and distinct channel. Indeed, whenever there are seas free to the navigation of all nations and the people on their borders, their open waters outside of the portion surrounded or enclosed between narrow headlands or promontories on the coast, as stated by Mr. Justice Story, or 'without the body of a country,' as declared by Sir Matthew Hale, are properly characterized as high seas, by whatever name the bodies of water of which they are a part may be designated. Their names do not determine their character."<sup>15</sup>

The term "high," according to Mr. Justice Field, in one of its significations is used to denote that which is common, open and public. Thus every road, or way, or navigable river which is used freely by the public is a "high" way. So a large body of navigable water, other than a river, which is in extent beyond the measurement of one's unaided vision, and is open and unconfined, and not under the exclusive control of any one nation of people, but is a free highway of adjoining nations of peoples, must fall under the definition of high seas within the meaning of the statutes of the United States. The open, unenclosed waters of the lakes may just as appropriately be designated as the high seas as the ocean, and so also with the similar waters of the Mediterranean.<sup>16</sup>

Our study of the "high seas" invites to a further study of the crimes committed thereon. The Constitution conferred upon Congress the power "to define and punish piracies and felonies committed on the high seas, and offenses against the law of nations."<sup>17</sup> Congress in turn enacted the law which says that "robbery and murder committed on the high seas shall be deemed

<sup>15</sup>150 U. S. 249; 12 How. 443; 146 U. S. 387.

<sup>16</sup>150 U. S. 249.

<sup>17</sup>Art. 1, Sec. 8, Const.

piracy," and in a separate act it also provided that "If any person or persons whatever shall, upon the high seas, commit the crime of piracy, as defined by the law of nations, and such offender or offenders shall be brought into, or found in the United States, such offender or offenders shall, upon conviction thereof, etc., be punished with death."<sup>18</sup> In the application of the intent and letter of these acts to practical cases a series of contests and contentions has already arisen. One of the most discussed decisions is that Congress is bound to define, in terms, the offense of piracy, and is not at liberty to leave it to be ascertained by judicial interpretation. When the question of the specific power of Congress to do this was brought before the supreme tribunal of the land in the case of *The Irresistible*, Justice Story, in rendering the opinion of the court, said: "The power given to Congress is not merely to define and punish piracies; if it were, the words 'to define' would seem almost superfluous, since the power to punish piracies would be held to include the power of ascertaining and fixing the definition of the crime. But the power is also given 'to define and punish felonies on the high seas and offenses against the law of nations.' The term 'felonies' has been supposed not to have a very exact and determinate meaning in relation to offenses of the common law committed within the body of the country. However this may be, in relation to offenses on the high seas it is necessarily somewhat indeterminate, since the term is not used in the criminal jurisdiction of the admiralty in the technical sense of the common law. Offenses, too, against the law of nations cannot, with any accuracy, be said to be completely ascertained and defined in any public code recognized by the common consent of nations." But supposing Congress were bound in all cases to define the offenses, still there is nothing which restricts it

<sup>18</sup>U. S. Statutes at Large, 113; U. S. Statutes at Large, 513.



to a mere logical enumeration in detail of all the facts constituting the offense. Congress may as well define by using a term of a known and determinate meaning as by an express enumeration of all the particulars included in that term. In respect to murder, where "malice aforethought is of the essence of the offense, even if the common law definition were quoted in express terms, we should still be driven to deny that the definition was perfect, since the meaning of 'malice aforethought' would remain to be gathered from the common law. There would then be no end to our difficulties, for each definition would involve some term which might require some new explanation."

The next most important feature of the subject under our consideration is whether the crime of piracy is defined by the law of nations with reasonable certainty. Every writer on the law of nations alludes to piracy as a crime of a settled and determinate nature. All writers concur in holding that robbery or forcible depredations upon the sea, *animo furandiare*, is piracy.<sup>19</sup>

English common law also recognizes and punishes piracy as an offense, not against its own municipal code, but as an offense against the law of nations, which is part of the common law, as an offense against the universal law of society, a pirate being deemed an enemy of the human race.<sup>20</sup>

Whatever may be the diversity of definitions in other respects, the writers on the common law, or the maritime law, or the law of nations, all treat the question in the same way, agreeing that piracy is an offense against the law of nations, and that its true definition, by that law, is robbery upon the sea.<sup>21</sup> In the language of the Supreme Court, pirates are "freebooters

<sup>19</sup>Am. and Eng. Enc. of Law, 18, p. 461; Hall's Int. Nat. Law, p. 169; Taylor's Int. Pub. Law, p. 234.

<sup>20</sup>Hawk. P. C., C. 37, 3, 2.

<sup>21</sup>Inst. 112, 4 Bl. Comm. 73.



upon the sea, not under the acknowledged authority of, or deriving protection from, the flag or commission of any government. If under such circumstances the offense be not piracy, it is difficult to conceive of any which would more completely fit the definition."

## CHAPTER XII

### ART AND SCIENCE

LESS attractive, yet more important legislation in the United States could not be found than that relating to copyrights and patents. American advancement is an intellectual advancement; its advance-couriers are the authors, editors, publishers, painters, poets, musicians, and inventors who are spreading American ideas among their fellow-citizens. We can easily discern the intellectual leaders on the European and Asiatic horizon at the first glance, but on the American horizon we can hardly do so. This difference is not due to the fact that there are more such leaders in this country than in other lands, but is due to the fact that the American intellect is of such a high average that a choice is difficult. Newspapers, magazines, and books spread pages of intellectual thought from one end of the country to the other, while photographers and lithographers embellish everything in an effort to keep pace with the former. Poor men and children adorn their walls, for only five cents, with colored reproductions of the great masterpieces of artistic genius. Laws relating to copyrights are the rulers of intellectual life in America; therefore the study of the constitutional construction of the legislative power to encourage and protect the arts and sciences invites our present attention.

Among the most important of the powers conferred upon Congress is that "to promote the progress of science and useful

arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries." However, the legal protection given to authors and inventors did not commence with the promulgation of the Federal Constitution, nor with the resolution passed by the Colonial Congress recommending the several States to secure to the authors of new books the copyright of such books.

The original colonies already had their respective copyright laws; protection of authors in their rights over their productions was contemporaneous with colonization in the newly discovered world. The Legislature of the Connecticut colony said in its act that "It is perfectly agreeable to the principle of natural equity and justice that every authorship be secured in receiving the profits that may arise from the sale of his works, and such security may encourage men of learning and genius to publish their writings, which may do honor to their country and service to mankind." The Massachusetts colony had also an act "to encourage learned and ingenious persons to write useful books for the benefit of mankind." The former State, according to its act of January, 1783, protected the rights of authors for the term of fourteen years; the latter, according to its act, "for the full and complete term of twenty-one years from the date of publication."

Under the Federal Constitution, twenty-five public acts relating wholly or in part to copyrights have been passed, together with nine private copyright acts; and according to the copyright register of Solberg, "during the period of considerably more than a century more than two hundred copyright bills have been laid before Congress for its consideration." There is now pending a copyright bill in Congress, and such bills will continually be laid before Congress in proportion to American progress in science and art. The laws of civilized countries

recognize the power of municipal law to create property out of abstract things. Copyrights and patents are to insure the right of possession in this abstract property. Under the common law of Great Britain such species of property as literary labor and the ideas of men were jealously protected before publication, but when their works were published the common law protection ceased and the parliamentary provisions were substituted to their full extent; although we are aware of the great case of *Miller vs. Taylor*, which was decided in favor of the common law right as against the statute.<sup>1</sup> But we also recall a still more important case,<sup>2</sup> in which Lord Kenyon said: "All arguments in the support of the rights of learned men in their works must ever be heard with great favor by men of liberal minds to whom they are addressed. It was probably on that account that when the great question of literary property was discussed, some judges of enlightened understanding went the length of maintaining that the right of publication rested exclusively in the authors and those who claimed under them for all time; but the other opinion finally prevailed, which established that the right was confined to the times limited by the act of Parliament. And that, I have no doubt, was the right decision." And Lord Ellenborough, in the case of the *University of Cambridge vs. Bryer*, enlightens our understanding on the subject in England when he says: "There was no right at common law; but of that we have not particularly anything to do."<sup>3</sup> From these authorities and others, the law appears to be settled in England, since the statute of 8 Anne, that the property of an author in his literary works can only be asserted under that statute. That an author, at common law, has a property in his manuscript, and may obtain redress against any one who deprives him of it, or who by improperly obtaining a copy endeavors to realize

<sup>1</sup>4 Burr. 2303.<sup>2</sup>7 Term Rep. 627.<sup>3</sup>16 East, 319.

a profit by its publication, cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world. In the language of Mr. Justice McLean: "But, if the common law right of authors were shown to exist in England, does the same right exist, and to the same extent, in this country? It is clear there can be no common law of the United States. The Federal Government is composed of twenty-four sovereign and independent States, each of which may have its local usages, customs, and common law. There is no principle which pervades the Union and has the authority of law that is not embodied in the Constitution and laws of the Union. The common law could be made a part of our Federal system only by legislative adoption."<sup>4</sup> Thus arriving at an American understanding of the power of Congress, no one can deny that when the Legislature is about to vest an exclusive right in an author, it has power to describe the conditions on which such right shall be enjoyed; and no one can avail himself of such right who does not substantially comply with the requisitions of the copyright laws.

There are forty-five countries that have copyright laws in their constitutions, codes, or ordinances. And it seems to us strange that, although we observe the existence of such copyright laws for over a century in this country and for a considerably longer period in Europe, we find that there is only one country—Japan alone—with which the United States has a copyright treaty. This treaty was ratified on the tenth day of May, 1906. In connection with the foreign copyright laws, the provisions of the act of March 3, 1891, relating to the importation of books from foreign countries to America, attract our attention. The American Book Company, of New York,

<sup>4</sup>8 Peters, 591; 11 Curtis, 223.

filed an application with the Government for relief in the matter of the importation of a certain book, in supposed violation of Section 3 of the copyright act of March 3, 1891. The fact stated was that the said American Book Company was the owner of the copyright, under assignment from Harper & Brothers, of New York, and the subject matter for discussion was that the importation consisted of folded and unstitched sheets constituting the parts of the copyrighted book, designed to be stitched and bound in volumes in this country as the eighth edition, but not made from type set within the limits of the United States. The legal question was whether the book, having been copyrighted in this country prior to the act of 1891, was subject to the prohibitive provision of Section 3 of said act. The Department of Justice rendered its decision according to the authorities, through the Attorney-General, and held that when Harper & Brothers had been duly invested with the ownership of the copyright, ownership was given under the then existing law of 1882, which did not prohibit the importation of sheets printed abroad from type not set within the United States. In the Attorney-General's own language, "A law speaks from the date of its approval, or from the future date fixed for it to take effect, except so far as it is in terms retrospective. The general rule is that a law is prospective in operation." There is another case which is contrary to the above case, decided in favor of an American firm. It was the case in which a certain Paris publisher attempted the importation of a book which had been copyrighted in the United States and duly assigned to the publishing house of Brentanos, of New York. The question presented to the Attorney-General was: Whether by force of the specified exception to the prohibition of importation in Section 3, act of March 3, 1891, an edition of a book written in French, printed exclusively in that language, and wholly made abroad, may be



imported into this country, although the same literary composition is copyrighted in the same language under the laws of the United States and is wholly printed and made into a book in this country. The said specified exception to the prohibition of importation read: "Provided, nevertheless, that in the case of books in foreign languages, of which *only* translations in English are copyrighted, the prohibition of importation shall apply only to the translation of the same, and the importation of the books in the original language shall be permitted." But we also know that in this case there was a valid copyright on the book in the original French language. It was but proper for Attorney-General Griggs, who decided the American Book Company case, to direct: "Hence I hold that you have the authority to refuse entry to the importations in question. To hold otherwise, it seems to me, would be to strike down, in large measure, the protection to foreign authors, in consideration of which reciprocal protection is extended to our authors abroad, and to strike down to the same extent the protection to American labor, which certainly constituted the joint intent and the main purpose of the law."

Whenever the words "works of an author" appear in the copyright laws, we are instructed to construe them as having the same meaning as "writings," including in the term "writings" all forms of record in which the thought of an author may be recorded and from which it may be read or reproduced. The works on which copyrights may be claimed are books, including composite and cyclopædic works, directories, gazetteers, and other compilations, new matter contained in new editions; periodicals, including newspapers; lectures, sermons, addresses, dramatic compositions, musical compositions, maps, works of art, models or designs for works of art, reproductions of a work of art, drawings or plastic works of a scientific or technical

character, photographs, prints, and pictorial illustrations. The copyright secured under the copyright laws shall endure for twenty-eight years in the case of any photograph, thirty years in the case of any posthumous work, and other works for the remainder of the lifetime of the author and thirty years after his death; provided, that within the year next preceding the expiration of twenty-eight years from the first publication of such work the copyright proprietor shall record in the copyright office a notice that he desires the full term provided in the law; otherwise the copyright protection shall determine at the expiration of twenty-eight years. The notice of "copyright" shall be affixed to each copy published or offered for sale in the United States, with the author's name. In case of a photograph or posthumous work of art, the notice of copyright shall be impressed upon some accessible portion of the margin, back, permanent base or pedestal, or on the substance on which such copy shall be mounted; in case of a book or other printed publication, upon its title page or the page immediately following; if a periodical, either upon the title page or upon the first page of text of each separate number or under the title heading; or if a musical work, either upon its title page or on the first page of the music. If any person shall infringe the copyright in any work protected under the copyright laws, such person shall be liable to an injunction restraining such infringement and to pay the copyright proprietor such damages as to the court shall appear to be just.<sup>5</sup>

So far we have endeavored to understand that power of Congress which can grant or withhold a right to the author, but the same power must be understood to apply to the inventor; for we cannot expect that in the case of the author a perpetual right

<sup>5</sup>59th Cong. 2d Session, A Bill to Consolidate and Revise the Acts respecting Copyright.

could be given under the common law principle and in the case of the inventor the same right could be withheld. The existence of the principle must operate equally for the author and the inventor. In what respect does the right of an author who has written a most useful and valuable book differ from that of an inventor who has invented a most useful and valuable machine? The result of their labors may be equally beneficial to society, and in their respective spheres they may be alike distinguished for mental vigor. Therefore we believe it a principle of justice, and in conformity with sound reason, to place the author and the inventor on the same level under the statutory provisions and under the rules of property which regulate society and which define the rights of things in general.

In the United States the word patent is applied to two distinct things, one meaning the title deed by which a government, either state or federal, conveys its lands, and the other meaning those instruments by which the United States secures to inventors the exclusive right in their own inventions. The exclusive right of the patentee in this country is domestic in its character and is confined within the United States. It is created by the acts of Congress, and no right can be acquired unless authorized by the statute.<sup>6</sup> Under the patent laws, exclusive privileges are granted to the first inventor or discoverer of any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvement thereof, not known or used by others in this country, and not patented or described in any printed publication in this or foreign countries before his invention or discovery thereof. But the patenting or published description of an invention in any foreign country, if more than two years before the application in this country, bars a patent.

<sup>6</sup>19 How. 183; 10 How. 494; 137 U. S. 41.

An application for a patent for an invention, or discovery, or for a design filed in this country by any person who has previously regularly filed an application for a patent for the same invention, discovery, or design in a foreign country which by treaty, convention, or laws affords similar privileges to the citizens of the United States, shall have the same force and effect as the same application would have if filed in this country on the date on which the application for patent was first filed in such foreign country, provided the application in this country is filed within twelve months and provided the invention is among those patentable as above enumerated.<sup>7</sup>

To be entitled to a patent, a person must have invented and discovered some new thing. But it is not enough that a thing is new; it must not have been known before, it must be useful, and it must amount to an invention or discovery. An invention differs from a discovery, although the law places the two words together. We all know that the word "discovery" is used to signify the finding out of something that existed before; but the first contrivance of any machinery by which this discovery is applied to practical use is an invention. The former, although not known, has always existed, while the latter not only was not known, but did not exist before. Therefore, although the word "discovery" is said in the American statute to be patentable, every discovery is not a patentable invention. The discoverer of a mere philosophical principle or abstract theory, or elementary truth of science, cannot obtain a patent, unless the same can be applied to a directly useful purpose. The patent can only be for such a principle, theory, or truth when reduced to practice and embodied in a particular structure or combination of parts.<sup>8</sup> In the United States, inventive skill has been

<sup>7</sup>Rev. Pat. Laws, Dec. 1, 1905.

<sup>8</sup>132 U. S. 39; 140 U. S. 481; 151 U. S. 186; 1 Holmes, 340.

defined as "that intuitive faculty of the mind put forth in the search for new results, or new methods, creating what has not before existed, or bringing to light what lay hidden from vision; it differs from a suggestion of that common experience which arose spontaneously and by a necessity of human reasoning in the minds of those who had become acquainted with the circumstances with which they had to deal. Every improvement is not an invention; it must be the product of some exercise of the inventive skill. Invention in the sense of patent law means the finding out, the contriving, the creating of something which did not exist and was not known before, and which can be made useful and advantageous in the pursuits of life, or which can add to the enjoyment of mankind."<sup>9</sup>

The date of the application, and not the date of the patent, controls in determining the legal effect to be given to two patents issued at different dates for the same invention, but the patent always takes effect on the day it is issued. Still, there are decisions of the courts which point out that the true date of an invention is the point where the work of the inventor ceases and the work of the mechanic begins.<sup>10</sup>

We have already learned that an invention must be useful, and yet the word "useful" does not mean useful in aiding counterfeiting, picking pockets, or assassinating; it cannot be meant in reference to anything which would be injurious to the morals, the health, or the good order of society, or that would be a subject for the police power of the State.

An instructive case on the question of a patent being subject to the police power of the State was the case of one Jordan, who was sued in an action of debt to recover certain penalties for practicing medicine in violation of an Ohio statute regulating

<sup>9</sup>22 Fed. Rep. 841; 140 U. S. 55; 113 U. S. 72; 107 U. S. 200.

<sup>10</sup>143 U. S. 275.



the practice of medicine and surgery. He had no certificate to practice medicine, but his defense rested, in part, upon the ground that the medicine administered by him was that for which letters patent had been issued to his assignor, granting to the latter the exclusive right of making, compounding, administering and using that medicine. Jordan insisted that the State government could not restrict or control the beneficial or lucrative use of the invention, and that, as assignee of the patentee, he was entitled to administer the patented medicine without a license as required by the State statute. The Supreme Court of Ohio said: "If the State should pass a law for the purpose of destroying a right created by the Constitution, this court will do its duty; but an attempt by the Legislature, in good faith, to regulate the conduct of a portion of its citizens, in a matter strictly pertaining to its internal economy, we cannot but regard as a legitimate exercise of power, although such law may sometimes indirectly affect the enjoyment of rights flowing from the Federal Government."<sup>11</sup> Again, one Vanini assigned his rights in a patent for a mode of drawing a lottery to Yates and McIntyre, who filed an injunction against other brokers who were using Vanini's plan and thus violating the patent right secured to Vanini. The Court of Error and Appeals of Delaware said: "At the time Yates and McIntyre made contracts for the lottery privileges set forth in the bill we had in force an act of Assembly prohibiting lotteries, the preamble of which declares that they are pernicious and destructive to frugality and industry, and introductive of idleness and immorality, and against the common good and general welfare. It, therefore, cannot be admitted that the plaintiffs have a right to use an invention for drawing lotteries in this State merely because they have a patent for it under the United

<sup>11</sup>Ohio, 295.



States. A person might with as much propriety claim a right to commit murder with an instrument because he held a patent for it as a new and useful invention." Both of these cases were cited later and approved in a most interesting way by Mr. Justice Harlan in the case of *Patterson vs. Kentucky*, a case in which this distinguished jurist rendered the opinion of the Supreme Court.<sup>12</sup>

<sup>12</sup>97 U. S. 501.

## CHAPTER XIII

### WAR

**A**CCORDING to the Constitution, Congress alone is invested with power "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water; to raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; to provide and maintain a navy; to make rules for the government and regulation of the land and naval forces; to provide for calling forth the militia to execute the laws of the Union, suppress insurrections and repel invasions; to provide for organizing and disciplining the militia, and for governing such part of them as may be employed in the service of the United States."<sup>1</sup>

When differences between States reach a point at which both parties resort to force, or one of them does an act of violence which the other chooses to look upon as a breach of the peace, the relation of war is set up, in which the combatants may use regulated violence against each other until one of them has been brought to accept such terms as his enemy is willing to grant. In the language of the Supreme Court, war is "that state in which a nation prosecutes its rights by force."<sup>2</sup> And whether the hostile party be a foreign invader, or States organized in rebellion, it is none the less a war, although the declaration of it be unilateral. It is none the less a war on that ac-

<sup>1</sup>U. S. Const. Art. 1, Sec. 8.

<sup>2</sup>2 Black, 635.

count, for war may exist without a declaration on either side. However, we are aware of the recent fact that the plenipotentiaries have affixed their signatures to the convention at the Hague, which provides that "The contracting powers agree that hostilities between them should not begin without a previous unequivocal notice, which shall either be in the form of a declaration of war with reasons therefor, or of an ultimatum with a conditional declaration of war. A state of war shall be made known without delay to the neutral powers, and shall not be effective with regard to them until they receive a notice, which may even be given by telegraph. However, the neutral powers cannot use the lack of a notice as a pretext if it should be proven beyond doubt that they really knew of the state of war." The convention further provides that, "Article I of the present convention shall be applicable in case of war between two or more of the contracting powers. Article II shall be binding in the relations between a contracting belligerent and neutral powers which are also contracting parties."<sup>3</sup>

Be this as it may, let us go on with our constitutional construction of war, rather than the international construction of it. A declaration of war by one country only is not a mere challenge to be accepted or refused at pleasure by the other. The battles of Palo Alto and Resaca de la Palma had been fought before the passage of the act of Congress of May 13, 1846, which recognized "a state of war existing by the act of the Republic of Mexico." Similar was the act of Congress by which war was declared to exist between the United States and Spain, as it had existed five days prior to the act, and the President was authorized "to use the entire land and naval forces of the United States." These acts not only provided for the future prosecution of the respective wars, but were themselves the

<sup>3</sup>Done at The Hague, the 18th day of October, 1907.

vindication and ratification of the acts of the Presidents of the respective periods in accepting the challenge without a previous formal declaration of war by Congress. The Supreme Court, in the prize cases, in rendering its decision regarding the lawfulness of seizures and the condemnation as prizes of vessels violating the blockade of Southern ports, said some most vital things: "This greatest of civil wars was not gradually developed by popular commotion, tumultuous assemblies, or local, unorganized insurrections. However long may have been its previous conception, it nevertheless sprung forth suddenly from the parent brain, a Minerva in the full panoply of war. The President was bound to meet it in the shape it presented itself, without waiting for Congress to baptize it with a name, and no name given to it by him or them could change the fact. Objection made to this act of ratification, that it is *ex post facto*, and therefore unconstitutional and void, might possibly have some weight on the indictment in a criminal court. But the precedents from that source cannot be received as authoritative in a tribunal administering public and international law."<sup>4</sup>

In pursuance of the authority vested in Congress by the Constitution, Congress, in the act of 1795, has provided "that whenever the United States shall be invaded, or be in imminent danger of invasion from any foreign nation or Indian tribe, it shall be lawful for the President of the United States to call forth such number of militia of the State or States most convenient to the place of danger or scene of action as he may judge necessary to repel such invasion, and to issue his order for that purpose to such officer or officers of the militia as he shall think proper."

This provision of the act of 1795, that the Congress has constitutional power to provide against possible invasion, has not

<sup>4</sup>2 Black, 640.

been overthrown by the decisions of the Supreme Court. We see that there is no ground for doubt on this point, for the power to provide for repelling invasions includes the power to provide against the attempt and danger of invasions, as the necessary and proper means to effect the object. One of the best means of repelling invasion is to provide the requisite force for defense before the invader has reached our soil.<sup>5</sup> Here we need to consider the States' rights with regard to military organization, as State rights are always related to those of the nation in any and all propositions. If the military powers vested in Congress by the National Constitution are plain, we must now consider the rights of the States from the constitutional point of view. Each State has its distinct laws and the nation has its separate departments; neither government can intrude within the jurisdiction of the other, nor authorize any interference therein, except as authorized by the Constitution and the laws passed in pursuance thereof, which are declared by the Constitution itself to be the supreme law of the land, "anything in the Constitution or laws of any State to the contrary notwithstanding." Congress being invested with these powers by the Constitution, its power to control the government and regulation of the land and naval forces is plenary and exclusive. As an illustration: The State judges and State courts authorized by the State laws have an undoubted right to issue the writ of *habeas corpus* in any case where a person is alleged to be restrained illegally within the State jurisdiction. But if, upon application, it appears that the party is confined under the authority, or color of authority, of a United States military officer, the writ would be refused. And if, upon application, it did not so appear, the courts of the State have a perfect right to examine into the matter and demand by what authority the prisoner has been

<sup>5</sup>12 Wheat. 19; 5 Wheat. 1.

restrained. This right of the State is necessary because of the complex character of the two distinct and separate sovereignties involved. But after the return has been made and the fact duly proved that the prisoner was confined under the order or by the authority of the United States, the State judges cannot go any further. Nor is there any limitation of this power on the part of the United States, for it is to the interest of the United States as much as to the State to protect the rights of its citizens.<sup>6</sup>

There are in the United States two sorts of military land forces, one called the army and the other called the militia. Now, we all know that the militia was an institution of the States before the adoption of the Constitution. The militia is therefore under the government and regulation of State officers, provided that they observe the uniform Federal law in so far as training and organization are concerned. The State militia system exists for the purpose of suppressing insurrection or rebellion, and whenever the Federal Government is in need of aid it has the power to call upon this force. The militia is, therefore, in time of Federal need a Federal force; otherwise it is always the State force, or, as the Constitution expresses it, "the militia of the several States." The right of the State to maintain a militia, unless the Constitution changes, cannot be hampered by absorption of the State militia into the Federal force, which would practically do away with the rank and file of the State officers, or place them under the Federal officers.<sup>7</sup> In England and Japan, although the former has that system commonly called the militia, the national jurisdiction and county jurisdiction are so welded together that, in the nature of the thing, this American division of local and federal authority is not required. In Japan, strangely enough, under the

<sup>6</sup>13 Wall. 397.

<sup>7</sup>45 Pa. 238.



feudal régime, each feudal fief had its own forces, and the feudal central government had also its own national forces. In the bow-and-arrow age of Japan its military system shows quite a resemblance to that of America, being divided into the national forces and the state militia. But the inauguration of the imperial régime brought the country into an integral whole, and now there is not the slightest division of authority over the militia, but all are under the central military government. Japanese soldiers know nothing of such a military system as the one Americans know as the State militia.

An English soldier, while he is a member of the standing army, is also subject to all the duties and liabilities of an ordinary citizen. He cannot escape from civil liabilities. An English soldier may, as has been well said, "be liable to be shot by a court-martial if he disobeys an order, and to be hanged by a judge and jury if he obeys it." No one who has entered into the spirit of military organization and government in Japan, Prussia, France, or Russia can believe that the rights of a private individual would be allowed to override thus the claims of the public service in those countries.

Naturally, the free people of America are jealous of the exercise of military power. But American people all understand that the power conferred on the President by the act of 1795 is a limited power, confined to cases of actual invasion. This limited power has given rise already to such a question as this: Is the President the sole and exclusive judge whether the exigency has arisen, or is it to be considered an open question? May every officer and every soldier to whom the orders of the President are addressed decide to refuse or obey such orders?

If we look at the language of this military legislation, every conclusion drawn from the nature of the power granted is

strongly fortified. The words are: "Whenever the United States shall be invaded, or be in imminent danger of invasion, . . . it shall be lawful for the President, . . . to call forth such number of the militia, . . . as he may judge necessary to repel such invasion." The power itself is confided to the Executive of the Union, to him who is, by the Constitution, the commander-in-chief of the militia when called into actual service of the United States, "whose duty it is 'to take care that the laws be faithfully executed.'"<sup>8</sup> And his responsibility for an honest discharge of his official obligations is secured by the highest sanction. He is necessarily constituted the judge of the existence of the exigency in the first instance, and is bound to act according to his belief of the facts. If he does act and decide to call forth the militia, his orders for this purpose are in strict accord and conformity with the provisions of the law, and it would seem to follow, as a necessary consequence, that every act done by a subordinate officer in obedience to such orders is equally justifiable. The law contemplates that under such circumstances power shall be given to carry the orders into effect; and it cannot, therefore, be a correct inference that any other person has a right to disobey them. The law does not provide for any appeal from the judgment of the President, or for any right in subordinate officers to review his decision and thus in effect to defeat it. Whenever a statute gives a discretionary power to any person, it is to be exercised by him upon his own opinion of certain facts. We are of the opinion that such is and ought to be the true construction of the military act. It is no answer that such a power may be abused, for there is no power which is not susceptible of abuse. The remedy for this, as well as for all other official misconduct, if it should occur, is to be found in the Constitution itself. In a free gov-

<sup>8</sup>Art. 2, Sec. 3, Const.

ernment the danger must be remote, since, in addition to the high qualities which the Executive must be presumed to possess—those of public virtue and honest devotion to the public interests—the frequency of elections and the watchfulness of the representatives of the people of the several States and of the nation carry with them all the checks which can be useful to guard against usurpation or wanton tyranny.

## CHAPTER XIV

### UNWRITTEN POWERS OF CONGRESS

**B**EFORE we endeavor to understand when a law is or is not constitutional, we must consider, however casually, what is the particular law whose constitutionality we are striving to understand. We must beware at the outset of letting ourselves drift upon the fathomless sea of ethics and morality. Some writers in foreign countries, in their zealous desire to study everything, end by aimlessly floating on a sea of generalities, and never reach the study of their own immediate domain. Let us, therefore, keep in view the boundary between the province of ethics and of morals, and the province of the statesman and of the legislator; the latter being the domain which deals with legal rights or with those laws which are the rules and regulations promulgated by the legislatures concerning such rights. If, in keeping within this boundary, we refer to the sources whence we obtain our knowledge of the law, or the authority which gives them the force of law, or the mode in which, or the person through whom have been formulated rules which have acquired the force of law, it must be incidentally. The arrangement or classification of law is not our present purpose.

A statute is the written will of the legislature, solemnly expressed according to the forms necessary to constitute it the law of the State. We use the word "statute" to designate the written law as contradistinguished from the unwritten law. We

will use the word "act" to denote something done or established by a body of men, such as a legislature, a council, or a court, including decrees, edicts, laws, judgments, resolves, awards, or statutes. Some general laws made either by Congress or the State Legislature are styled joint resolutions, and have the same force and effect as those styled acts. When we say general law we must bear in mind that the term general has a twofold meaning. With reference to the subject-matter of a statute, it is to be taken in the sense of public as opposed to private. General law is the law that applies to and operates uniformly upon all members of any class of persons, places, or things which require legislation peculiar to themselves in the matters covered by the law. Whether a law is to be considered local or special, we may be able to determine by its effect, and not by its form.

The usual form for promulgating law in this country is, *Be it enacted*. To enact is to establish by law. We often use the term lawful, by which we mean not contrary to law. When we use the term unlawful, we use it with reference to that which is in its substance prohibited by law. And legal is often used as synonymous with the term lawful. But we observe a distinction between these terms. Suppose we make an oral agreement to convey land. Now, our act, in so doing, does not violate law. But in order to enforce it we need written evidence; therefore, the oral agreement to convey land is not legal. Let us change our example slightly to see this distinction more clearly. If the record of the conveyance is authenticated by the act of a judge or other authorized officer, the matter becomes legal so as to be lawfully read in evidence. Again, the term lawful may be used either in reference to law or to equity. But legal is used sometimes in opposition to equitable, as, for instance: The legal estate is in the hands of the trustee; the equitable estate is in the *cestique trust*. The legal estate may be enforced in a

court of law, in contradistinction to an equitable estate, the right to which can be established only in a court of equity. Law is said to be constitutional because it is consonant with and agrees with the Constitution. If it is opposed to the principles or rules of the Constitution it is unconstitutional. In England, even though an act of Parliament is unconstitutional in principle, it is, nevertheless, constitutional, because the Parliament possesses supreme power. The remedy for unconstitutional enactments in England must therefore be political or revolutionary. But in America it may be found in the ordinary process of the courts, to which we must remain loyal under all circumstances, because ours is the government of law.

We must remember that under the American interpretation an act of the Legislature, either Federal or State, is not to be declared unconstitutional and void unless the violation of the Constitution is so manifest as to leave no room for reasonable doubt. Moreover, until such violation is proved clearly and strongly, and also their absolute incompatibility with each other, we must presume that there has been no transgression of power by the Legislature. This presumption is but a decent respect for a co-ordinate branch of the Government, the members of which act under the oath of fidelity to the Constitution. Those who contend for or affirm the unconstitutionality of an act should not succeed in raising a doubt of its constitutionality on the ground of slight implication and vague conjecture.

When we investigate the nature and extent of the powers conferred by the Constitution upon Congress, we must keep in view the objects for which those powers were granted. There are more indispensable reasons for studying these objects in construing Congressional powers under the Constitution than there are for studying the statutes themselves. "The Constitution unavoidably deals in general language. It did not suit the pur-



pose of the people in framing this great charter of our liberties to provide for minute specifications of its powers, or to declare the means by which those powers should be carried into execution."<sup>1</sup> "A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which it may be carried into execution," the Supreme Court of the United States says, "would partake of the prolixity of a political code, and would scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves."<sup>2</sup>

True, it is not indispensable to the existence of any power claimed for the Federal Government that it should be found specified in the words of the Constitution, or clearly and directly traceable to some one of the specified powers. We may deduce a power from more than one of the expressed powers or from all of them combined. We believe that in ordinary usage the suspension of the writ of *habeas corpus* virtually amounts to the suspension of the Constitution itself. But in great exigencies, such as war, insurrection, or invasion, there have been innumerable instances of justifiable suspension of it both in Great Britain and in this country. The declaration of martial law in a State virtually means the suspension of the writ.<sup>3</sup> So, although we know that there is no express grant of such a power, yet it is shown irresistibly that somewhere in the Constitution power to suspend the writ was granted either through one, or more than one, or through a combination of all the pow-

<sup>1</sup> Wheat. 326.

<sup>2</sup>4 Wheat. 316; 4 Curtis, 415.

<sup>3</sup>*Ex parte Merryman*, 9 Am. Law. Reg. 524; *Ex parte Field*, 5 Blatch. 63; 131 U. S. 405; 8 Wall. 595; 21 Ind. 370; 44 Ill. 142; 7 How. 1; 12 Wall. 457.

ers granted. And here it is to be observed that important powers not enumerated and not incidental to any one of the enumerated powers are granted in the amendments to the Constitution. The first ten of the fifteen amendments were suggested in conventions of the States and proposed at the first session of the first Congress. They were ratified by a sufficient number of the States to secure their adoption before December 15, 1791.<sup>4</sup> The Eleventh Amendment merely imposes a restriction upon the Federal judicial power in exclusion of its jurisdiction of suits against the States brought by citizens or subjects of other States or of foreign countries. It was adopted in 1798. The Twelfth Amendment is an introduction of a change in the mode of electing the President and Vice-President, and was adopted in 1804. The last three amendments were ratified by the States as follows: The Thirteenth, December 30, 1865; the Fourteenth, July 28, 1868; and the Fifteenth, March 30, 1870.<sup>5</sup>

The last three amendments were not adopted to further the advocated Federal centralization of powers, but because the State or local powers had become extended to such an alarming degree as to destroy the national sovereignty over liberties truly intended by the Constitution. And the first ten amendments were adopted, not to enlarge the then advocated State or local powers, but because it was feared that the national centralization of power had become extended to such an alarming stage that timely restraint upon the Federal powers was needed. The amendments stripped neither the State nor the Federal Government of power, but were merely the construction of the original Constitution as understood by the people; not as understood by either one of the three co-operative branches of the Government,

<sup>4</sup>12 Wall. 457.

<sup>5</sup>All these amendments originated in Congress, were proposed by Congress and ratified by the States.

but by the sovereignty of the country, as its manifestation of what the original Constitution ought to have been.

We are aware of the fact that Congress has often exercised power not expressly given nor ancillary to any single enumerated power. In the language of Cooley, "Without these and similar incidental powers, the Government would be as completely without the means of perpetuating its existence as was the Confederation itself"; and according to Story, "Powers thus exercised are what we call resulting powers arising from the aggregate powers of the Government."

Happily, the powers conferred upon Congress were settled during the earliest period of its existence. What Chief Justice Marshall said in early times of this branch of Constitutional construction has been and will always be true: "It would be incorrect and would produce endless difficulties if the opinion could be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power. Where various systems might be adopted for that purpose, it might be said with respect to each that it was not necessary, because the end might be obtained by other means."<sup>6</sup> Congress, we may add, has the exclusive power to choose whatever means it sees fit, and also has the exclusive use of such means as are conducive to the execution of a power conferred upon it by the Constitution. These principles have heretofore been accepted by all the decent tribunals of this country, and they will continue to be so accepted by universal consent.

We now thoroughly understand that when an act is called into question as injurious and violative of the natural, social, or political rights of the citizen, if it cannot be proved that such natural, social, or political rights are protected by the Constitution, the act must be considered valid and constitutional, irre-

<sup>6</sup>2 Cranch. 358-396.

spective of the fact that it may be unjust or injurious. There have been innumerable instances where an act, either Federal or State, was held unconstitutional or void by the proper coordinate branch of the Government. But we must take them as having been within the following principles: Congress can enact any statute within the authority conferred upon it by the Constitution, expressed or implied, and whether conferred by one, or more than one, or all of the provisions combined; while the State's Legislature can enact any statute against which there is no prohibition in the Constitution of the State or of the United States, whether expressed or implied, or whether imposed by one, or more than one, or all of the provisions combined.

The design of the Constitution was to establish a government competent to undertake the direction and administration of the affairs of a great nation. To this end it was needful only to make express grants of general powers, together with implied grants of such incidental and auxiliary powers as are required for the exercise of the powers expressly granted.

In the history of the practical administration of the American Government this design has been fulfilled in the exercise of the implied powers granted to Congress, thus perpetuating its manifest destiny. All the powers of this nature are included in the last clause of Article I, Section 8, of the Constitution of the United States, which declares that Congress shall have the power "to make all laws which shall be *necessary and proper* for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof." This Constitutional declaration at once excludes all doubt in respect to the existence of implied powers. Most conspicuously the words "necessary and proper" direct respect for that other co-

ordinate branch of the Government which must decide their application. At the same time, the plain meaning of the words used by the wise men who framed the Constitution and the intelligent citizens who adopted it warns the generations that inherit the instrument. When the Constitution was framed it was framed for ages to come, and it was framed to realize immortality as surely as mortals could frame it.

The powers of Congress, ever since they were put into practice, have been hackneyed themes. They have furnished the material for every class of rhetoric in the "hustings," and partisan organs have proclaimed them with the regularity of the seasons. Their evolutionary course has naturally been exposed to storms and tempests, for their guardians were but men. No error is so common among a free people as the tendency to deprecate the present and all its agencies and achievements. But if we search the record of the so-called "better days" of the republic we will find that we are living in a far better day. If we distrust the present-day Representatives and Senators, let us study Jefferson through Hamilton, or Washington and Hamilton through Jefferson, or Jackson through Clay, and the second Adams and Clay through Jackson and Randolph, and we are bound to come to the conclusion that those to whom the powers of Congress are now entrusted are more worthy of our confidence than we are sometimes inclined to think.





PART III  
THE PRESIDENT



## CHAPTER XV

### THE PRESIDENT

The executive power shall be vested in a President of the United States of America.—*Article 11, Section 1, U. S. Constitution.*

THE Constitutional provision created the office of the President of the United States. It vested at the same instance the entire executive power in a single individual. The head Executive of the American nation shall hold office during the term of four years, together with the Vice-President, chosen for the same term.

The President and the Vice-President must each be a natural born citizen of the United States and have attained the age of thirty-five years. A naturalized citizen is ineligible to either office. The President of the United States, the strictest creature of the Constitutional nomenclature, is not obnubilated behind the mysterious obscurity of counselors. Power is communicated to him with liberality, though with ascertained limitations. To him the provident or improvident use of it is to be ascribed. For the first, he will have and deserve undivided applause. For the last, he will be subject to censure; if necessary, to punishment. He is a dignified but accountable magistrate of a free and great people. The tenure of his office, it is true, is not hereditary, nor is it for life, but still it is a tenure of the noblest kind; by being a man of the people, he is invested; by continuing to be a man of the people, his investiture will be voluntarily, and cheerfully, and honorably renewed.<sup>1</sup>

<sup>1</sup> Wilson's Works, 400.

But, as to the re-investiture of the renewal, we are called upon to observe the unwritten understanding of the Constitution, and to observe the precedent that has been handed down from President to President, a characteristic peculiarity of the republican form of government as it was pictured in the breasts of the fathers who framed the Constitution and in the hearts of those who have inherited it.

The representatives of the people, when they met in the Constitutional Convention for framing the Constitution, found hardly any part of the governmental system the arrangement of which was attended with greater difficulty, and there was none which had been inveighed against with less candor or criticised with less judgment.

Among the many questions presented to the framers of the Constitution, the most conspicuous ones were: (1) Whether the Executive should be a single man or a council; (2) whether the Executive should call on the judges for advice.

Nearly every member in the Convention seemed to feel apprehensive of monarchical authority and of concentrated and high-handed government. In the sight of the framers there seemed always revealed a vision of king or emperor whose despotic hands were stained with the oppression of human freedom and the agony of the people. It seemed out of the question that the people's representatives would ever agree to confer the great power of the Executive upon one man, and every one felt this. The least approach to the idea of having one man as the Executive halted the progress of the Convention, whose sentiment was well declared when Mr. Randolph spoke of this idea "as the fœtus of a monarchy." On the other hand, they were well aware of their experience under the feeble and procrastinating executive system of the Articles of Confederation, and of their need of an Executive who had sufficient authority to meet the demands

of progress. Yet they could not easily solve the situation created by the demands of the new Government on one hand and the hateful shadow of George the Third on the other. A one-man Executive was, for the time being, unimaginable.

When the question of a single or council Executive was presented for discussion, however, Mr. Gerry was at a loss to discover the reason of the policy of having several members for the Executive, saying: "It would be extremely inconvenient in many instances, particularly in military matters, whether relating to the militia, an army, or a navy." Continuing his bold challenge against the plan of the three-man Executive, he said: "It would be a general with three heads." As to whether the Executive should call on the judges for advice, Mr. Wilson was of opinion that "the supreme national judiciary should be associated with the Executive in the revisionary power." This opinion Mr. Madison seconded. Mr. Ellsworth supported their views when he said: "The aid of the judges will give more wisdom and firmness to the Executive. They will possess a systematic and accurate knowledge of law, which the Executive cannot be expected always to possess. The law of nations, also, will frequently come into question; of this the judges alone will have competent information."<sup>2</sup> Against these urgings, Mr. Gorham said that he could not see the advantage of employing the judges in this way. "As judges, they are not to be presumed to possess any particular knowledge of the mere policy of public measures." He continued: "It would be best to let the Executive alone be responsible, and at most to authorize him to call on the judges for their opinions." Mr. Strong, however, even more vigorously opposed the plan, and remarked that "the judges, in exercising the functions of expositors, might be influenced by the part they had taken in passing the laws."

<sup>2</sup> Elliot's Debates, Vol. 5, p. 345.

The intrepid Mr. Madison moved, and, indeed, very wisely, that before the discussion on this point the Convention should define the powers to be intrusted to the Executive. He undoubtedly had in mind that in defining the powers of the Executive they might approach nearer to a solution than by a discussion of the personnel of the Executive. By this new turn of the discussion, however, the Convention had to confront still greater questions. Now the Convention had to settle the problems: (1) Whether the Executive should be appointed by the Executives of the States; (2) whether the Executive should be elected by electors who were to be chosen by the qualified voters of districts into which the States should be divided; (3) whether the Executive should be elected by the National Legislature.

The question of electing the Executive naturally involved the question of the term of the executive office: (1) Whether the Executive term should be for life during good behavior; (2) whether the Executive should be re-eligible; (3) whether he should be nonre-eligible.

These immediate problems had to be settled before the other questions could be discussed by the Convention. There was no sign of ease. The problems were debated with vigor and earnestness, for in the minds of the statesmen there was the consolation that by arriving at a satisfactory conclusion as to the term, the vexatious question of the one-man Executive might solve itself. A one-man Executive was seen to be needed for efficient service, but was dreaded for moral reasons. Mr. Sherman, who opposed rotation "as throwing out of office the man best qualified to execute the duties," was seconded by the opportune proposition of Mr. Wilson for a "three-year term, with re-eligibility." Mr. Williamson, however, suggested a six-year term. Mr. Mason, who feared intrigue with legislation if the Executive was re-eligible, insisted upon a term of "seven years and nonre-eligibil-



ity." Mr. Bedford, seeing the unceasing yet uncompromising debates between those who insisted upon three years and re-eligibility, and those who advocated seven years and nonre-eligibility, interceded with the compromising proposal of "three years and ineligibility after nine years."

The election of the Executive by the Legislature was strongly opposed; among the opposing arguments we find that of Mr. Gouverneur Morris, "that he would be the mere creature of the Legislature, and the result will be the work of intrigue, of cabal, and of faction; it will be like the election of a Pope in a conclave of cardinals; real merit will rarely be the title to the appointment." Mr. Madison added to the opposing side the protest that there is "shown a tendency in our Government to throw all power into the legislative vortex. The Executives of the States are little more than ciphers, the Legislatures omnipotent." At this stage there appeared a light that somewhat cleared the obscure atmosphere of the Convention, in the form of a point suggested against non-eligibility for a second term of office. "The non-eligibility for a second term of office," said Mr. Morris, "will tend to destroy the great motive to good behavior, hope of being rewarded by a reappointment. It is saying to 'make hay while the sun shines.' " But the argument for a term during "good behavior" was unanimously considered outweighed by the argument that "if he behaves well, he will be continued; if otherwise, displaced; this is equivalent to a term during good behavior."

A fresh question was opened by the argument that there was no greater reason why the Executive should be independent of the Legislature than why the Judiciary should be. The people of the States will then choose the first branch, the Legislatures of the States the second branch of the National Legislature, and the Executives of the States the national Executive. This

would form a string of attachments in the United States to the national system.

At every stage of the debate we notice the apparent fear of a monarch, a fear that some time the Executive might gather concentrated power in his hand and that freedom might once more be trampled down. This feeling is noticeable throughout the debate. In this connection, Dr. Williamson said: "It is pretty certain that we should at some time or other have a king; but we would omit no precaution to postpone the event as long as possible." It was due to this feeling that Dr. Franklin's philanthropical view was brushed aside when he proposed that the Executive should have no compensation, but his expenses should be paid. Through a fear of a combination of love of power and love of money in one person, the statesmen were ever jealous to avoid a repetition in future days of such a distasteful incident as when Charles II was bribed by Louis XIV. So it was unanimously agreed that the Executive should have a fixed compensation, to be paid out of the National Treasury.

Now that the consideration of the main proposition was about to be presented before the Convention, there was renewed vigor in debate, and redoubled efforts were made, which seemed to the minds of those present to disintegrate rather than to arrive at any conclusion. Despairing of more unanimity on further propositions, the resolution went, as it was, to the Committee on Detail. The report of this committee was submitted to the Convention, and, in the main, recommended that the Executive should be styled "the President of the United States," and that he should be elected by the Legislature by ballot. This report that the President should be elected by ballot was no better than the proposed solution before the debate ever commenced, and it started a new trouble. For, when the vote was cast, it ended only in disintegration on account of equality

of votes—four to four, two pairing, and one absenting. Again the resolution went in the same form to the Committee of Eleven.

This committee accordingly recommended that the term of the President be four years, with re-eligibility; that electors be selected in each State as its Legislature should direct, and be equal in number to its total representation in the houses of Congress, or, in other words: First, that the President of the United States be independent of the Legislature, thus providing against foreign influence and the danger of cabals and intrigues with the co-ordinate branches of the Government; second, that the choice of the Executive be left to electors, or indirect popular vote, and not to a direct popular vote over the whole country, thus providing against dangerous excitement, yet insuring that the elected be the choice of the whole people; third, that the term of the President be so short as to prevent usurpation of power for personal objects. Thus was finally concluded and inscribed in the second article of the Constitution that which had taken up more periods and breath of statesmen, often disappointing by failure to agree, than any other portion of the Constitution.

The end of one was the beginning of a new question—a question most delicate and vexatious then as now—whether the Executive be re-eligible for a third term, a fourth term, a fifth term, and so on, as long as that particular individual might be able to influence the public. The framers of the Constitution limited his re-eligibility as far as human minds could conceive, thus preventing the indulgence of selfish motives by any who might occupy the highest office of the country. But they did not give us the written words for or against the question. There is nothing except the unwritten will of the fathers that they did not approve of keeping one man in the executive office all the time,

whether his public conduct be "good behavior" or not. This unwritten understanding, which was the very foundation in framing the Constitution, is all there is to guide those who aspire to the office of Chief Magistrate of those people who inherit the United States. George Washington was elected in 1789 and re-elected in 1792. To his personality and the certainty that he would be the President, it was said, in great measure was due the fact that the inexpressible hatred against a one-man Executive had been placated and such a provision finally adopted in the Constitution. But when he had served this second term he absolutely refused to accept a third term, and sounded the time-honored warning for those who succeeded him in the office of President. "The period for a new election of a citizen to administer the executive government of the United States being not far distant, and the time actually arrived when your thoughts must be employed in designating the person who is to be clothed with that important trust, it appears to me proper, especially as it may conduce to a more distinct expression of the public virtue, that I should now apprise you of the resolution I have formed to decline being considered among the members of those out of whom a choice is to be made. The acceptance of, and continuance hitherto in, the office to which your suffrages have twice called me have been a uniform sacrifice of inclination to the opinion of duty, and to a deference for what appeared to be your desire. I constantly hoped that it would have been much earlier in my power, consistently with motives which I was not at liberty to disregard, to return to that retirement from which I had been reluctantly drawn. The strength of my inclination to do this, previous to the last election, had even led to the preparation of an address to declare it to you; but mature reflection on the then perplexed and critical posture of our affairs with foreign nations and unanimous

advice of persons entitled to my confidence impelled me to abandon the idea."<sup>3</sup>

During the administrations of Presidents Jefferson, Madison and Monroe the political leaders and the people of their respective times thought a success of the third-term propaganda, although mentioned in passing remarks, unthinkable. But in the second administration of President Grant efforts to nominate him for a third term were made to such an extent as almost to break the time-honored national usage. These efforts may have been justifiable on account of Grant's great popularity and his special services to the nation. The journals of that day showed a well-determined tendency to confer upon the President this unprecedented honor. Strange to say, however, there arose an unlooked-for dissension among Grant's own political supporters and an antagonism among his immediate friends, which finally defeated his nomination for a third term in the Republican Convention. Strange, we say again, that whenever a question arose that vitally concerned the destiny of America there has always been an unlooked-for event in one form or another, which event finally determined the policy which shaped the future of the republican form of government—a form of government which no race or nation of men has long succeeded in maintaining. The strange hand whose touch we feel has been manifested in the history of the American nation, seems always to be in touch with the free institutions which are spreading the blessings of equal liberty to all and teaching the universal brotherhood of men.

The Grant incident not only confirmed the precedent set by the first American President and carried out the will of the founders of the Government, but also inspired once more the American heart for the benefit of posterity. However, there

<sup>3</sup>Washington's Farewell Address, Sept. 19, 1796.



seems to come about every half-century a decisive event in the life of this country, put upon the people as a trial, the determination of which is of vital concern to democratic destinies. George Washington's refusal of a third term preserved the country from aspirants for a third term for not very much more than a half-century, and the instance of President Grant has again kept the nation nearly a half-century. Now the half-century from the time of Grant approaches, and at this writing we see before us once more an uncertain American atmosphere concerning the question. The ground on which we believe that a President should decline a third term is the very confidence of the people that he has gained—the very fact that he is popular—either of which facts ultimately justifies him in not submitting to a re-election. In discussing this question, we do so independently of any opposition to or accusations against a President's official career—accusations made sometimes by the honest judgments and convictions of the leaders of men, and oftentimes by men so base and wicked. As to why a President should not submit to re-election for a third term, we would say:

The American people are the American sovereign, and as such "can do no wrong." They alone can amend or add what they please to the Constitution. But the sovereign people did not and do not really amend or add anything to the Constitution. On the contrary, they left and are leaving the Constitution, which regulates their servants, as it was when it first came from the hands of their representatives who framed it. The people construe and reconstrue the true meaning of the Constitution as it stood in the administration of George Washington and in that of Ulysses S. Grant. They command that in accordance with the spirit of the Constitutional Convention the longest term that one individual should ever be given the great office should not be more than a "term



of seven years, with nonre-eligibility," but if re-eligible, then two terms, or eight years. We are yet to know if the American sovereign will jealously uphold the majesty of the law, when the law is so framed as to regulate the sovereign. The American people seem impatient to substitute their priceless inheritance of constitutional government for the government of the mob. But they cannot well disregard the organic law; so, under this rule of sovereign's conduct, they should command their servants not to submit to a second re-election. And they will obey, because they are so popular and so sensitive to the will of the American people.

Going back to our original investigation, we find that we left ourselves on the point that the President should be elected by State electors, whose number shall equal the number of its representatives in both houses of Congress. In the two elections of George Washington, in 1789 and 1792, there was not the least trouble, for everybody was for him. The method of electing the President was for the electors to cast their votes, and whoever received the most votes was declared President, and the next in number was declared Vice-President. But unlooked-for trouble soon began during the election at the beginning of the second term of Washington, not on account of Washington, to be sure, but on account of the Vice-President. For the first time there appeared two candidates for the Vice-Presidency—one being Mr. Clinton and the other being Mr. Adams. This then unlooked-for event in the election has since formed a regular page of great political fabrics. Now that Washington forever had resigned, the political parties—one called the Federalist party, later becoming an integral part of the Republican party, and the other named the Republican party in its later days, and finally becoming the Democratic party of the present time—for the first time presented their respective candidates

for President on a strictly party issue. Then the Republican party put forward no less a person than Mr. Jefferson, and the Federalist party, Mr. Adams. All the succeeding elections for the Presidency have been the result of battle-cry, firing on the party lines. But the judgment of the electors had come to be too important, and their powers were thought too exaggerated for the people at large to leave the matter to their choice. The undercurrent of unanimous desire on the part of the people necessarily put the electors in a secondary place.

Beginning with the fourth Presidential election a complete change took place, which is as we find it to-day.<sup>4</sup> The political parties every four years meet in national nominating conventions and present their candidates for the Presidency before the people. The American people study the political problems of national and international importance in their four years' school of politics, and submit to at least one hundred days' examination of their proficiency in their hard study. Then one day they vote for the electors, and when that day is over the Presidential election is over, and they know who is elected. This polling day is therefore the greatest day in American politics. Some pray the Almighty to lend them a helping hand, if their study of practical humanity has been mistaken. Some are commonly called "rings," which consist of those persons who from patriotic (?) reasons associate themselves and solicit others to associate with them for the justification of certain principles they think best. Some are named "bosses," whose business it is to oversee party affairs on Presidential election day. This is con-

<sup>4</sup>At the sessions of Congress in 1825-26, an attempt was made to procure an amendment to the Constitution, so as to do away with all intermediate agencies, and obviate caucuses and conventions, etc., and to give the election to the direct vote of the people. The proposed amendment did not receive the requisite support of two-thirds of the entire body of the Senators and Representatives.

sidered as the ideal day and occasion on which to show their love of country in co-operation with the "rings" and the national political party of which they are members.

The Presidential electors in the first four elections exercised their own judgment and power. Thenceforward the people directly elected the President. The electoral system, of course, still exists, but the electors' position is simply that of messengers who carry the will of the people to the record. We must not omit the important change made by the Constitutional provision of 1804. Until then the President and Vice-President were elected by the relative number of votes. But that was modified by the Twelfth Amendment to the Constitution in that year. Thenceforward the President and Vice-President were voted for separately. "They shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President."

The American Constitution is silent as to the eligibility of woman for the office of President. As the letter of the Constitutional provision stands, the masculine pronoun "he," meaning the President, indicates that the person of Presidential eligibility must be of the male sex, otherwise a feminine President becomes a matter of possibility. There are some American women who are advancing from a plane where they were only capable of loving and serving their own immediate relations to a plane where they really care about their city, State, and country. They seem to realize that the world's mothers must not only bear and rear good and healthy sons and daughters, but must help make good and healthy all the sons and daughters of mankind.

The President being in office, if it becomes necessary to remove him from office, or in case of his death, resignation, or inability to discharge its powers and duties, the Presidential

office devolves on the Vice-President. Congress by law has provided for the case of disability of both President and Vice-President, declaring what officer shall then act as President until the disability be removed or a President elected. When the President is elected he shall, before entering upon the duties of his office, take an oath, declaring: "I do solemnly swear that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect, and defend the Constitution of the United States."

The President is directed to send from time to time a message to Congress, or, in the language of the Constitution, "information of the State of the Union." He is empowered to convene both houses of Congress or either of them; and, in case of disagreement, he may adjourn them to such time as he shall think proper. He also has power to sign or veto bills passed by the two houses before they become law. When he vetoes a bill he must return it with his objections to the house in which it originated. If that house reconsiders the bill and passes it by a two-thirds vote, it shall be sent, together with the President's objections, to the other house; if again approved by two-thirds of that house, it shall become a law over the President's veto. However, any bill not returned by the President within ten days after it shall have been presented to him, Sundays excepted, will become a law in like manner as if he had signed it, unless Congress by its adjournment prevents its return. He must sign all orders, resolutions, and votes, to which the assent of both houses is necessary, except on a question of adjournment. However, what seems an extraordinary power to be vested in one man is the Constitutional provision that "He shall take care that the laws be faithfully executed."

Standing upon these Constitutional authorities, the President has the sole and undivided responsibility of Chief Magis-

trate of this great people. The very reason that one man is vested with such enormous power naturally inspires the individual American citizen—from the cradle to the grave—with a feeling of stronger obligation and a greater interest in government because of his having been providentially born an American citizen. Becoming President, the citizen's own sense of duty and exact regard for reputation impels him all the more to the consciousness appropriate to the office.

It may be said that Washington and Jefferson are more inseparable from present-day oration and eulogy than Harrison and Arthur; that Lincoln and Grant have gathered to themselves more glories and laurels than Polk and Pierce; but we cannot, or, rather, ought not, be unmindful and unappreciative of each and every President, whose self-sacrificing service, differently rendered in given periods of the history of the nation, is the priceless heritage of the American generations. There is nothing we inherit to-day that has not come from the combined services of our twenty-six Presidents, and there is no reason why we should not celebrate each and every one of them, the fruits of whose labors we harvest. It may be said that there is no President who has not been accused or vilified. Washington was accused of corruption in expending public money. Roosevelt is charged with being a public enemy of prosperity. But they were less accused than President Johnson. There was no attempt to put them out of the White House. Yet every President, accused or not, has left some evidence of having made the great republic still greater before the world. The American President does not despair on account of such accusations or disapprobation, because he knows every great man the world has ever known has been accused or vilified. This is but the experience of every political society which calls a man to vigorous leadership as the regenerating power of a patriotic people.



The Americans are born strugglers, and their political history proves that their very breath is political struggle, and shows the impossibility of their living otherwise. We cannot separate their politics from the peaceful progress of their nation. The strong Government party, the Federalists or Whigs, later became an integral part of the Republican party. It was first headed by Alexander Hamilton, James Madison, and John Jay, who advocated the adoption of the Constitution and whose pens supplied much of the current political literature of that day. The Anti-Federalists, who opposed every preliminary step looking to the adoption of the Federal Constitution and adhered to the rights of the States and those of local self-government, later became incorporated into the great Democratic party. The Anti-Federal party was not without popular orators and leaders. Patrick Henry and Samuel Adams took special pride in espousing the cause of the Anti-Federalists. The war question between the Whigs and Tories, or colonial parties, the latter supporting the Crown, must have passed quickly away as living issues came up, though the newspapers and contemporaneous history show that the old taunts and battle-cries were applied to the new situations with a plainness and virulence that must be envied by the sensational and more bitterly partisan journals of our own day. The political parties have revolutionized the policy of the Government through the bitter conflicts of opposing opinions, and the Government has been strengthened by these trials. The long-lingering passions of civil war most recently embittered American political strife, but peace and justice were the inexorable purposes of the people, and they prevailed. Sectional hatred, long fanned by political necessities, was henceforth effaced from politics, and the unity of a sincere brotherhood is forever cherished by the faith of every citizen. The result of the war was that each side has received from the other



the respect that has ever been awarded to brave men, and the affection that for a time was clouded by the passion that made both rush forward to achieve triumph has been chastened and strengthened by their common sacrifice. The battlefields of the Civil War are memorable as the theatre of the conflict of the noblest and most heroic people the world had to offer to the god of carnage, and the deeds of the South and the North are to-day the living monuments of patriotism and holiest devotion to the rights of man, whether those rights be embodied in Federal or local self-government.

But to read the newspapers and histories that describe the struggles either of the days of the founding of the nation or of the reconstructing periods of civil commotion is to account for the frequent use of the saying, "the ingratitude of the republic." For when partisan hatred could override the then recent utterances of Henry before the startled Assembly of Virginia, and of Adams in advocating the adoption of the Declaration of Independence, and, later, the opinions of Jackson and Lee on one hand, and Lincoln and Grant on the other—there must, at least to every surface view, have been rank ingratitude. Their good names, however, survived the struggle, as good names in the American Republic have ever survived. In politics the Teutonic and related races, then as now, characteristically hated with promptness and forgave with generosity.

With the exception of Washington, all the other Presidents were elected upon the angry sweep of political hurricanes, invoked for the purpose of lawful revolutions by the reserved power of an intelligent and patriotic people. Since the elder Adams, no citizen has been elected President who did not convince the sovereign people of his greatness and his competence to perform any work of needed regeneration. At each election time there have been visible, to be sure, certain partisan strifes

and waves of passion; otherwise the Americans would have been more than human. But every ebb and flow of virtue or tidal wave of passion has, whether providentially or not, served as the tempest that resulted in purifying the atmosphere, and all the more has caused the people to search for the great man of the time—all the more has caused them to ask for a man worthy of the nation's past and prophetic of its future; a man who had the audacity of genius; a man who had the grandest combination of heart, brain, and conscience for the particular work demanded.

The American citizen who becomes President is like a captain who is intrusted to safely bring into harbor a great ship that is battling with the fury of the tempest. It may be said that the twenty-three Premiers of England since the time of Washington and the eight Premiers of Japan since the Imperial Restoration were, like the twenty-six American Presidents, bold, courageous, honest, intelligent patriots of their respective nations. The selection of the Premiers of Japan and Great Britain is, perhaps, a natural selection, but it is made from among the limited number of great men circumscribed by the aristocratic influence of their governments. Therefore the Japanese and English Premiers naturally look anxiously for the approval of those of the rank or class to which they belong, and think the common mass of the people will take them as they are and accept them as great men. In contrast with these Premiers, the Presidents of the United States have to look anxiously for the approval of the common mass of the people, according to whose choice and under whose express command they receive their authority and sanction. There is no natural born citizen who may not be selected as the American President. The choice is made by the firesides where sit the great mass of the common people, who are inspired by love of home and love of country,

and who have the history of the past and the biographies of great men of bygone times to guide them. Thus is prepared the verdict that shall determine the wisdom of the American form of government.<sup>5</sup>

From the very beginning of the American Government under the American Constitution till now, twenty-six American citizens have occupied the office of the nation's Chief Magistracy, and they came largely from the common mass of the people. Each one had opposite characteristics from the others—all this was necessary in order to realize the country's grandest achievement from a common point of view. American citizens will, as in the past, continue to be ushered into the Presidential office—some for four years and some for eight years, some for more than one term, but less than two terms—all according to the Constitutional device framed and adopted by the fathers and inherited by their children. So perfectly and harmoniously is the Constitutional framework fashioned that the people can always exercise a salutary control over their servants. "It seems to have been imagined by some," said Dr. Franklin, who opposed the re-eligibility of the President in the Constitutional Convention, "that the returning to the mass of the people was degrading the Magistrate. This was contrary to republican principles. In free governments the rulers are the servants and the people their superior and sovereign. For the former, therefore, to return among the latter was not to degrade, but to promote them.

<sup>5</sup>Final election of the President and Vice-President takes place on the Tuesday after the first Monday in November. The political parties usually give about three months after nominating the candidates for the respective parties to the campaign before the final election. The nominating conventions, therefore, take place during June and July. The balloting of Delegates for the nomination has sometimes occupied many days.

The President's annual salary is \$50,000; Vice-President, \$12,000; the Presidential Cabinet members also receiving the same salary as the Vice-President.

And it would be imposing an unreasonable burden on them to keep them always in a state of servitude, and not allow them to become again one of the master."<sup>6</sup>

If the customary saying that revolution and national upheaval produce men of great character is true, then the constant, revolutionary and tempestuous forces of every Presidential election may also be expected to produce great men. If the American method of election is counted creditable on account of their choice of great men, then there is no defect or deformity in it which prevents the expression of the just, honest, intelligent, and sober sentiments and convictions of all the people, whether educated or ignorant, rich or poor. This method and the authority for it have been the source of safety and prosperity in times past, and they are to-day and will ever continue to be the guaranty of the success of free government. American citizens for time immemorial shall be free to occupy the great office of the Chief Magistracy, as they have been in the past. But those who occupy it must be great men. They must be sincere guardians of the dual system of government—guardians of both State and national rights. Their utterances must inspire and strengthen every patriotic impulse and make the people renew with holiest devotion their great work—a work bequeathed to them by their fathers. They must proclaim the deeds of their predecessors, and from their honored dead they must take increased devotion to the cause of higher humanity, truer justice, greater liberty. They must renew their high resolve that the dead shall not have died in vain, that the nation shall, under God, continue the great work of human salvation, and that “government of the people, by the people, and for the people” shall forevermore be imperishable from the earth.

<sup>6</sup>Dr. Franklin in the Constitutional Convention, July 26, 1789.

## CHAPTER XVI

### THE CABINET

**U**NDER the Constitution, the President is Commander-in-Chief of the Army and Navy of the United States and of the militia of the several States when they are called into the actual service of the United States. Standing alone, the Constitutional provision vests in the President the final and supreme power to declare martial law, and to confiscate and condemn or to forfeit what belongs to belligerents and enemies. The President cannot declare war, for that power belongs to Congress, but political history shows more than one occasion when the Presidential policy in a matter relative to international affairs has brought matters to a point which meant a declaration of war, from which policy Congress could not draw back, but could only endorse. In the same Constitutional provision the President is empowered to require the opinion, in writing, of the principal officers or heads of the executive departments upon any subject relating to the duties of their respective offices. In the United States, the President may, according to usage and custom, call together the principal departmental officers, commonly known as Secretaries, to deliberate on the important affairs of the Executive. This gathering is called a Cabinet meeting. However, the functions of the American Cabinet, the powers and duties of its members, are apparently different from those of a cabinet under a king or emperor. The Cabinet members are the mere executive



agents of the President, and any official act done by them, or one of them, is in legal contemplation done by the President, and the responsibility is not upon the Cabinet members, or upon any one of them, but upon the President.

All executive departments have been created by acts of Congress. During the first administration under Washington four departments were created by Congress, namely, the Departments of State, of the Treasury, of War, and of the Attorney-General—the Postmaster-General being subordinate to and included in the Treasury Department. The head of each was appointed by the President and confirmed by the Senate. Since then there have been created the following: The Department of the Navy, in 1796; of the Interior, in 1849; the Department of Agriculture, in 1888; and the Department of Commerce and Labor, in 1903. The Postmaster-General was invited to take part in the Cabinet meeting in 1829. These nine departments comprise the Federal executive machinery and their nine Secretaries constitute the American Cabinet. For the sake of comparison, let us take the Japanese executive organ. There, the central executive organ is divided by the Constitution into executive bodies and advisory bodies; here, there is no such thing. There, the executive bodies consist of the Cabinet as a whole, and the Departments of the Imperial Household, Foreign Affairs, Interior, Finance, War, Navy, Justice, Education, Agriculture and Commerce, and Communication, while the Privy Council as a whole and special commissions are advisory bodies. Here, the President has no such bodies as these advisory officers. In Japan, the Privy Council acts as an advisory body to the Emperor and attends to the affairs relative to the Imperial household law. Here, the Presidents change by terms and leave the White House with their families. The White House is not like the Imperial Palace, to be looked after only



in some such time as the summer vacation days in regard to such matters as the painting of the building, repairing needed by the wearing of the weather, and gardening, etc., all of which can be completed by a few workingmen. There, the Privy Council attends to the Imperial ordinances, the punitive measures of the Constitution itself, matters relating to treaties, international conventions, declarations of a state of siege, declarations of war, etc.; here, all such matters are attended to by the departments, under the direction of the President, with the advice and consent of the Senate, as well as of the House of Representatives. The American Cabinet, therefore, acts in a dual capacity, acting both as an executive body and also as an advisory body or privy council. Again, we observe a distinct line of demarkation between the powers of the Japanese Emperor and of the President. The former has more power, because he appoints all the members of the Cabinet as well as of the advisory bodies, whom he can retain or remove as he sees convenient; but the latter has among his advisory bodies such independent elements as the members of the Senate and House of Representatives, who are elected independently of the Executive, directly by the omnipotent power of the people, who anticipate them acting, if necessary, as a check and balance against the Presidential authority.

But, taking all in all, we recognize that the President of the United States has more power than a king or emperor, because he is the only responsible party of the American administration. According to the Constitution, the executive power "shall be vested in a President of the United States,"<sup>1</sup> and in no other. He is really his own adviser, combining in himself all the executive and advisory functions; above all, he has no obligation to hear or to be bothered with so-called advice from

<sup>1</sup>Art. 11, U. S. Const.

any body. The Emperor of Japan, however, is under this obligation, according to Prince Ito: "In performing their Heaven-received mission, sovereigns must first take advice before they arrive at a decision. Hence the establishment of the Privy Council is just as necessary as that of the Cabinet to serve as the highest body of the Emperor's constitutional advisers."<sup>2</sup> As to the Japanese Cabinet, the Constitution, Article LV, provides: "The respective Ministers of State shall give their advice to the Emperor, and shall be responsible for it." We therefore say that the American President, if he wills, has more power than the most centralized and most powerful monarch of any nation. When the President once determines a course of action, under his independent Constitutional authority, he can do almost any and every thing, and in that determination the Senate and the House of Representatives together cannot stay him, except by impeachment and punishment.

The Secretary of State occupies a most dignified place in the Cabinet; nevertheless he is not premier, neither does he preside over the Cabinet any more than the rest of the Secretaries do. The Attorney-General is comparable to the European and Japanese Ministers of Justice. He has tremendous power as the head of all the procurators, as counsel for the United States, and as legal adviser to the President. This office always falls to an attorney. However, the compensation does not generally justify the foremost men of the legal profession securing this office. Besides, as the office generally falls to a friend of the President, the qualification or rank of the attorney does not matter very seriously. But should any one come across the series of Attorney-Generals' opinions, he would know that the one after another who was responsible for legal administration touching the great issues of a given time must have been,

<sup>2</sup>Art. LVI, Japanese Const., Hirobumi Ito, Trans. Miyoji Ito.

whether providentially or not, a foremost attorney of that time. In some European countries the Minister of Justice, unlike the American Attorney-General, does not act publicly, but in a confidential capacity to the sovereign. In Japan the Minister of Justice has often been a statesman rather than an attorney. Still, his office has more extensive duties than that of the Attorney-General. The Japanese Minister of Justice exercises a power which could not be exercised in this country except by a combination of President and Senate, or President and Judiciary. He hears and determines as to who shall be the judges of the national courts, excepting the judges of the highest court of the country.<sup>3</sup>

The Secretary of the Interior is a great officer, to whom is confided the entire management of the public land, which is a quantity of unknown value. He also has jurisdiction over the great office of the Patent Bureau, not to mention such offices as the Pension, the Geological Survey, and others. The Secretary of Agriculture is another officer whose functions often touch closely the daily life of the people. He has to look after seed distribution and harvests, soils, forestry, the exporting of animals and the inspecting of meat, and the prevention of the spread of contagious diseases among animals. Besides, he forecasts the weather and opens the annual national Thanksgiving with his crop reports. The Secretaries of the Army and Navy indicate their importance by their names, as they are the sole guardians of the independence of the United States. The Postmaster-General and the Secretary of the Treasury are other delicate offices. The diversity and enormity of their responsibilities need little telling. Not speaking of other details, the former issued stamps alone to the amount of \$173,006,476.27, and distributed newspapers and periodicals to the extent of 765,-

<sup>3</sup>See Miyakawa's "Life of Japan," pp. 221-255.

405,427 pounds. The latter took charge of even a little note of \$80, as well as of the public debt of \$2,457,188,061.54, and of cash on hand to the amount of \$1,688,027,086.83.<sup>4</sup> And yet these departments about a century ago were created as the youngest members of the corresponding departments of about thirty-seven countries. What great strides the financial and communication arms of the Executive have made and are making!

Lastly created, but perhaps the most growing executive department, is that of Commerce and Labor. Having been organized with George B. Cortelyou as its first Secretary, followed by V. Metcalf, and now (1908) under Oscar Straus, the department is passing the fifth year of its existence in uplifting in no uncertain degree the commercial industries of the nation. The department covers an extensive province, into which, among many other things, falls such business as immigration, naturalization, corporations, labor, manufactures, navigation, steamboat inspection, lighthouses, fisheries, coast and geodetic survey, and the standards of weights and measures.

Before turning to the main investigation of the prerogatives and limitations put upon the Executive, Cabinet members, and other national executive officers under the Constitution, we need a little observation as to how such great developments have come about in the executive department of the Government. In back of these great developments, as represented by the Secretaries of the departments, we behold the unfaltering courage and the countless sacrifices of those who founded the framework of the Government, of those who built upon it the great departments, and of those who are now inheriting them. Whenever official aristocracy and luxury tempted the servants of the people to indifference and ease, there are no records of heroism which

<sup>4</sup>These figures are for the fiscal year ended July 1, 1907.

can dim the lustre of their achievements in the preservation of the great work which the fathers bequeathed. Say not that corruption and perfidy growing out of unparalleled prosperity and greatness are about to stain the triumphs of to-day. We cannot question the laurels with which present leaders have been crowned by a grateful country, any more than we can question the first preferment by the fathers of him who was first in war and first in peace. We must remember that even he had not a lieutenant who escaped distrust. There was distrust of the Cabinets of Washington and the elder Adams. Distrust was the tireless assailant of Jefferson and Madison. It made the Jackson administration tempestuous. It resulted in a teeming fountain of discord under Polk, Tyler, Pierce, Buchanan, and Cleveland. It gave us the fraternal war under Lincoln. Hamilton was charged with profligate legislation, and Jefferson did not cherish faith in Hamilton's work. The present prosperity is the crown of an unbroken record of achievements over the ever-present distrust of every administration that has gone by.

The Constitution declares that the President, the Vice-President, and all civil officers of the United States are liable to removal and punishment. Vested in the House of Representatives is the sole power of impeachment, and in the Senate the sole power to try impeachments. When the President is tried, the Chief Justice of the Supreme Court of the United States shall preside. When President Johnson was impeached, he was acquitted by one vote less than the two-thirds necessary for conviction. Judgment in cases of impeachment shall not extend further than to removal from office and disqualification to hold and enjoy any office of honor, trust, or profit under the United States. But the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law. As to the words "civil officers" in the



Constitutional provision, they may be construed as meaning all officers who hold their office under the National Government, irrespective of their department, but it rests with the Senate, as the court of last resort, to decide who are included within that designation. The President's power to grant reprieves and pardons does not extend to cases of impeachment.

The Constitution empowers the President to grant reprieves and pardons for offenses against the United States, except in cases of impeachment. Under this power, the President has granted reprieves and pardons since the beginning of the American Government. No statute has ever been passed regulating this power in cases of conviction by the civil authority, but the President has exercised his specific power in such cases. The word "pardon" does not mean, either in common parlance or in legal contemplation, an absolute pardon or the exemption of a criminal from the punishment which the law inflicts for a crime he has committed. It means, in the language of Justice Wayne, "forgiveness, release, remission. Forgiveness for an offense, whether it be one for which the person committing it is liable in the law or otherwise. Release from pecuniary obligation, as when it is said, 'I pardon you your debt'; or it is the remission of a penalty to which one may have subjected himself by the non-performance of an understanding or contract, or when a statutory penalty, such as money, has been incurred, and it is remitted by a public functionary having power to remit it. In the law it has different meanings, which were as well understood when the Constitution was made as any other legal word in the Constitution now is."<sup>5</sup>

It was with the fullest knowledge of the law upon the subject of pardons and the philosophy of government in its bearing upon the Constitution that the Supreme Court instructed Chief

<sup>5</sup>18 How. 307.



Justice Marshall to say "that the power has been exercised from time immemorial by the executive of that nation whose language is our language and to whose judicial instructions ours bear a close resemblance. We adopt their principles respecting the operation and effect of a pardon, and look into their books for the rules prescribing the manner in which it is to be used by the person who would avail himself of it."<sup>6</sup> This construction has ever since been accepted, and the important cases which followed it embodied the same reasoning. Pardon is said by Lord Coke to be a work of mercy, whereby the King, either before or after sentence or conviction is attained, forgives any crime, offense, punishment, execution, right, title, debt, or duty, either temporal or ecclesiastical. The King's coronation oath is "that he will cause justice to be exercised in mercy." Pardon is frequently conditioned, as he may extend his mercy upon what terms he pleases and annex to his bounty a condition precedent or subsequent, on the performance of which the validity of the pardon depends. And if the felon does not perform the condition of the pardon, it will be altogether void, and he may be brought to the bar and made to suffer the punishment to which he was originally sentenced. But, in the meantime, we must make it understood that the King cannot, by any previous license, make an offense unpunishable which is *malum in se*, that is, unlawful in itself as being against the law of nature, the common good, common law, and reason. "This power to pardon," again says the Supreme Court, "has also been restrained by particular statutes. By the Act of Settlement, no pardon under the great seal is pleadable to an impeachment by the Commons in Parliament, but after the articles of impeachment have been heard and determined he may pardon. The provision in our Constitution, except in cases of impeachment

<sup>6</sup>7 Pet. 162.

which are out of the power of the President to pardon, was evidently taken from these statutes, and is an improvement upon the same."<sup>7</sup>

As to reprieves, the same court gives us to understand that a reprieve not only can be used to delay a judicial sentence, when the President shall think the merits of the case or some fact connected with the offender may require it, but extends also to cases *ex necessitate legis*, as where a female after conviction is found to be *enceinte*, or where a convict becomes insane or is alleged to be so. Though the reprieves in either case produce delay in the execution of a sentence, the means used to determine either of the two cases just mentioned are clearly within the President's power to direct; and reprieves in such cases are different in their legal character, as they are different in the causes which induce the exercise of the power to reprieve.

In conclusion of our discussion of the specific power of the President to grant pardons, we cite the judicial philosophy of it, quoting the language of Mr. Justice Field: "It extends to every offense known to law, and may be exercised at any time after its commission, either before legal proceedings are taken, or during their pendency, or after conviction and judgment. The power of the President is not subject to the legislative control. Congress can neither limit the effect of his pardon nor exclude from its exercise any class of offenders. The benign prerogative of mercy reposed in him cannot be fettered by any legislative restriction. Such being the case, the inquiry arises as to the effect and operation of a pardon, and on this point all the authorities concur. A pardon reaches both the punishment prescribed for the offense and the guilt of the offender, and blots out of existence the guilt, so that in the eyes of the law the offender is as innocent as if he had never committed the

<sup>7</sup>11 How. 307.

offense. If granted before conviction, it prevents any of the penalties and disabilities which follow conviction; if granted after conviction, it removes the penalties and disabilities and restores him to all his civil rights; it makes him, as it were, a new man, and gives him new credit and capacity. There is only this limitation to its operation: it does not restore offices forfeited, or property or interests vested in others, in consequence of the conviction and judgment.”<sup>8</sup>

Of all the peculiar Presidential prerogatives provided for in the Constitution, the most conspicuous ones are the powers of appointment and the sole power of removal of the officers appointed in concurrence with the Senate. Alexander Hamilton, in defense of the making of these provisions, says: “It has been mentioned as one of the advantages to be expected from the co-operation of the Senate, in the Senate, in the business of appointments, that it would contribute to the stability of the administration. The consent of that body would be necessary to displace as well as to appoint.” But after the adoption of the Constitution Mr. Madison championed the opinion of a decided majority in the first session of the first House of Representatives which expanded the preliminary understanding of these prerogatives. In his language, “The Executive should have the power of independent removal, whether already derived from the Constitution or to be conferred by supplementary legislation.” A debate arose upon the clause in a pending bill providing that the officer therein named should be removable by the President. In the words of Mr. Madison at this time, “I feel the importance of the question, and know that our decision will involve the decision of all similar cases, and that the decision that is at this time made will become a prominent exposition of the Constitution.”

<sup>8</sup>4 Wall. 333.

The power of the President to remove without interference, or without the advice and consent of the Senate, has gone through the process of Constitutional construction by the highest court of the country. The Constitution, as to appointments, very clearly divides all the officers of the United States into two classes. The primary class requires a nomination by the President and a confirmation by the Senate. But, foreseeing that when offices became numerous and sudden removals necessary, this mode might be inconvenient, the framers of the Constitution provided that, in regard to offices subsidiary to those specially mentioned, Congress might, by law, vest their appointments in the President alone, in the courts of law, or in the heads of departments. That all persons who can be said to hold an office under the Government of the United States were intended to be included within one or the other of these modes of appointment there can be no doubt. "The association of the words 'heads of departments' implies," said Mr. Justice Miller, "that something different is meant from the inferior commissioners and bureau officers, who are themselves the mere aids and subordinates of the heads of departments. . . . It is clearly stated and relied on in the opinion that Hartwell's appointment was approved by the Assistant Secretary of the Treasury as acting head of that department, and he was, therefore, an officer of the United States." But as to a surgeon appointed by a commissioner, Mr. Miller, denying the former to be an officer of the United States, said: "If Congress had passed a law requiring the commissioner to furnish each agency with fuel at a price per ton fixed by law high enough to secure the delivery of the coal, he would have as much claim to be an officer of the United States as the surgeon appointed."<sup>9</sup> Mr. Justice Harlan also had occasion, not long ago, to affirm the principle that the

<sup>9</sup>99 U. S. 508; 6 Wall. 385.

power of removal or dismissal is vested in the President alone. But as to the dismissal of the army and navy officers under the new act, he said: "It is, in substance and effect, nothing more than a declaration that the power theretofore exercised by the President, with the concurrence of the Senate, of summarily dismissing or discharging officers of the army or the navy, whenever, in his judgment, the interests of the service required it to be done, shall not exist or be exercised in time of peace, except in pursuance of the sentence of a court-martial, or in commutation thereof. There was, as we think, no intention to deny or restrict the power of the President, by and with the advice and consent of the Senate, to displace them by the appointment of others in their place."<sup>10</sup>

"To the victors belong the spoils" has ever been the world-wide political practice, especially where elections by popular choice rule supreme. The "spoils system" seems to be the human habit everywhere. But we should remember that this practice cannot be said to prevail more in the United States than in England, Japan, or Germany. The Civil Service Act of 1883—an act establishing examination for posts under the Government and the power of investigation as to certain dismissals—gave the "spoils system" a deadly blow by keeping the minor administrative officers out of the domain of private patronage and politics. This act is now being and will in the future be more and more honestly administered, and many State and city governments are vigorously following the precedent of the National Government. But on that account the Presidential patronage to his "stand-pat" friends cannot be said to be altogether a bad thing. The Presidential friends, as his party leaders or campaign fund contributors—from the makers of "stump-speeches" to payers for election publications,

<sup>10</sup> 103 U. S. 227; 13 Pet. 498.



torches, coaches or bands of music—cannot be condemned as dishonest, incapable, and unintelligent as compared to those who passed the civil service examination. The Presidential patronage, like the political party itself, is a necessary institution. The Office of the head Executive of the nation often needs confidential advice in certain vital administrative matters, just as an attorney with his client or a physician with his patient; and the civil service system should not be expected to disturb the President in having about him those confidential friends who with heart and soul have supported his policy and purpose. However, we wish not to be misunderstood as opposing civil service reform, for we firmly believe it to be a most commendable thing and an essential factor in purifying politics. We have not yet discovered any serious case of dishonesty and criminal misuse of political patronage or any intrigues of politicians who previously pledged the public treasury for the benefit of incompetent appointees. The American individual is so imbued with characteristic common sense and self-direction that he would not and could not stand to occupy an official position without being sufficiently qualified and competent, but even if it were otherwise, public opinion could not tolerate it, being keenly watchful for any such contingency. The true condition here in America is far from what we have sometimes been led to believe by superficial critics in Europe and in Japan. What prevails in this country may be rightly said to be a mixture of the systems differently carried on in Japan, Germany, England, and France. That is, the system of Presidential nomination and confirmation by the Senate corresponds to the so-called State appointment of Japan and Germany; the civil service examination corresponds to the Japanese Koto-bunkan-shiken, or the English and French system, each of which is based upon merit



as determined by competitive examination.<sup>11</sup> A secret ballot law has been at work purifying politics, and there is now before the people a bill providing for the compulsory publication of campaign contributions. More than seventeen States in the Union have already passed measures securing in some degree the publicity of campaign funds. The State of New York in 1890 enacted the first publicity law adopted in this country, of which measure Governor Hughes said: "There is no better way of putting an end to bribery and corruption than by compelling full publicity as to campaign expenditures, and this was the intent of the legislation last year."<sup>12</sup> According to President Perry Belmont, of the National Publicity Bill Organization, "contributions by corporations should be restricted. The freedom of individuals to contribute according to their means and inclinations to party organizations need not be interfered with by legislation. There is, however, no inherent individual right to secrecy in respect to activities influencing the great court of public opinion, which, as the result of each national election, passed upon the rights and property of all. The turning on of the light cannot be deemed an unconstitutional increase of Federal or State control."<sup>13</sup>

<sup>11</sup>During the administration of Jefferson, the first civil service reform question was raised when Mr. Jefferson removed Elizur Goodrich, a Federalist, from the Collectorship of New Haven, and appointed Samuel Bishop, a Republican, to the place. The citizens remonstrated, but Mr. Jefferson replied, asserting the right of every administration to have its friends in office. Before the civil service reform actually commenced in 1883, and became more vigorous about 1890, under Civil Service Commissioner Theodore Roosevelt, a turning point of the reform may be traced to the time when President Hayes issued civil service order, dated June 22, 1877.

<sup>12</sup>U. S. Senator Patterson's Report of National Publicity Bill Organization, Senate Document, No. 195, 59th Congress.

<sup>13</sup>U. S. Senator Tillman's Report on article on "Publicity of Election Expenditures," by Perry Belmont, from *North American Review*, for February, 1905; Senate Document, No. 89, 59th Congress. The first National Publicity Bill Organization held a meeting, Washington, D. C., on

We still think it necessary to continue the same subject from another point of view, and to speak of matters not coming under the civil service act. How bitterly the subject of the Presidential powers of appointment and dismissal has been and may in the future be discussed is illustrated in the words of President Cleveland: "Within thirty days after the Senate met in December, 1885, the nominations of the persons who had been designated to succeed officials suspended during the vacation were sent to that body for confirmation, pursuant to existing statutes. Very often in the session frequent requests in writing began to issue from the Senate, to which these nominations were referred, directed to the heads of departments having supervision of the officers whose places it was proposed to fill by means of the nominations submitted, and for all papers on file in their departments which showed the reason for such suspensions. In considering the request made for the transmission of the reason for such suspensions and the papers relating thereto, I could not avoid the conviction that a compliance with such requests would be to that extent a failure to protect and defend the Constitution, as well as a wrong to the great office I held in trust for the people, and which I was bound to transmit unimpaired to my successors, nor could I be unmindful of a tendency in some quarters to encroach upon Executive functions, or of the eagerness with which Executive concessions would be seized upon as establishing precedents. . . . Therefore, the replies made to the committees by the different heads of departments stated that by direction of the President they declined furnishing the reasons and papers requested, on the

Jan. 17, 1906. Upon the motion of William E. Chandler, a resolution, amended pursuant to suggestions made by Samuel Gompers and J. H. Willson, was adopted, declaring that the object of the organization was "to secure the passage of an act of Congress." Perry Belmont was elected permanent President, and Frank K. Foster, Secretary.

ground that such reasons and papers related to a purely Executive act. Whatever language was used in these replies, they conveyed the information that the President had directed a denial of the requests made, because in his opinion the Senate could have no proper concern with the information sought to be obtained. . . . Thus was an unpleasant controversy happily followed by an expurgation of the last pretense of statutory sanction to encroachment upon Constitutional Executive prerogatives, and thus was a time-honored interpretation of the Constitution restored to us.”<sup>14</sup>

This co-operative appointment system of the President and Senate has in the past been often criticised within and without this country. Critics say that it may serve to give the President an undue influence over the Senate, or that it may have the opposite tendency. But such criticism is not well taken. In the United States political circumstances always manifest unlooked-for results. Nationally as well as individually the American characteristics ever have been and ever will be very peculiar in that they resist encroachments of any kind. The ambition of one separate and distinct part of the Government counteracts the ambition of another. It is said that justice is the end of government, and that it is the end of civil society. This is true, but it is also true that the Americans, like others of the human race, are not perfect. If they were, no government would be necessary. In America we notice the policy of remedying the defects of opposite and vital interests by higher considerations, a policy which is traceable throughout the whole system, private and public. These considerations are shown in the fact that the electors for choosing the President, as well as the State legislators who appoint the Senators, have been and ever will be, broadly speaking, the most enlightened, intelligent,

<sup>14</sup>Cleveland's Presidential Problems, pp. 45-76.

educated, and respected citizens. Those who are entrusted with such confidence and power possess every consideration that can influence the human mind and afford security for their fidelity, such as honor, oath, reputation, conscience, the love of country, and family affection and attachment.

The evidence resulting from the experience and cumulative development of the separate and distinct powers of the President and the Senate will never be completed. We have just grown to be at ease in the thought that the American Constitution could never be transformed into a monarchical or aristocratic form of government. But if such revolution should ever happen, the House of Representatives, together with the people, who are the only legitimate fountain of power and who alone are the grantors of the Charter, will at all times be ready to bring back the Constitution to its primitive form.

## CHAPTER XVII

### FOREIGN AFFAIRS

**I**N July, 1775, one year before the Declaration of the Independence of the American Colonies and their separation from England, the Continental Congress resolved to take charge of the foreign affairs, the determining of war and peace, the sending and receiving of ambassadors, and the entering into of alliances. Two months later the Congress "Resolved, that a committee of five be appointed for the sole purpose of corresponding with our friends in Great Britain, Ireland, and other parts of the world, and that they lay their correspondence before Congress when directed." On March 3, 1776, four months before the Declaration of Independence, the first American Ambassador, Silas Deane, was sent to France, having been instructed by Congress to appear in France in the character of a merchant. He was instructed not to let any one know that he was the American representative except Count Vergennes of the French Ministry. He was to endeavor to obtain arms and ammunition for carrying on the war of independence, and to ascertain whether France would feel disposed to enter into a treaty of friendship and alliance with the Colonies in North America in case independence was declared.

The first international recognition of American independence was brought about by the signing in Paris of the treaty of amity, commerce, and alliance, dated February 6, 1778, by Benjamin Franklin, Silas Deane, and Arthur Lee on the part

of the United States, and by C. A. Gerard on the part of France. Five months later the United States Congress, for the first time in the diplomatic history of this country, received a foreign representative, styled "minister plenipotentiary, C. A. Gerard." The rules for receiving foreign representatives were framed in Congress as follows: "At the time he is to receive his audience two members shall wait upon him in a coach belonging to the States, and the person first named of the two shall return with the minister plenipotentiary or envoy in the coach, giving the minister the right hand and placing himself on his left, with the other member on the front seat. When the minister plenipotentiary or envoy is arrived at the door of the Congress hall, he shall be conducted to his chair by the two members, who shall stand at his left hand. Then the member first named shall present and announce him to the President and the Congress, and them to him. He and the President shall again bow unto each other, and be seated, after which the House shall sit down. Having spoken and been answered, the minister and President shall bow to each other, at which time the House shall bow, and then he shall be conducted home in the manner in which he was brought to the House."<sup>1</sup>

All foreign affairs were meanwhile transacted by the Committee of Congress, but the nature or scope of efficiency of this Congressional diplomatic agency Mr. John Jay, about two years after the first minister was received, somewhat explains, writing to Mr. Lovell from Madrid, under date of October 27, 1780. He says: "I would throw stones, too, with all my heart, if I thought they would hit only the committee, without injury to the members of it. Till now I have received but one letter from them, and that not worth a farthing, though it conveyed a draft for one hundred thousand pounds on the Bank of Hope. One

<sup>1</sup>G. Hunt, *Am. Journal of Inter. Law*, p. 872.



good private correspondent would be worth twenty standing committees, made of the wisest heads in America, for the purpose of intelligence." About one year later Congress established the first diplomatic channel, called the Department of Foreign Affairs, of which Robert R. Livingston was elected Secretary, August 10, 1781. Secretary Livingston resigned on July 4, 1783, and was succeeded by John Jay, who entered on his duties September 21, 1784. Until his succession the Congress took charge of the foreign affairs. This department under the Articles of Confederation came to its end on September 16, 1788. However, Mr. Jay continued his work as the head of the Department of Foreign Affairs under the Government of the new Constitution, which had George Washington as its first President. Mr. Jay resigned on March 4, 1790, having in the meantime been appointed the first Chief Justice of the Supreme Court of the United States. Thomas Jefferson, on the twenty-first day of the same month, was appointed and confirmed to take charge of the Department of State, which had been created under the new Constitution on the funeral pyre of the old Confederation Congress. The new Congress passed "an act to provide for the safekeeping of the acts and records and seal of the United States," and also providing that the head officer shall be "called the Secretary of State." Of how successfully Mr. Jay during his administration conducted the Department of Foreign Affairs, further eulogies are but needless repetition. Mr. Livingston's ability and success as the first American in charge of the Foreign Department will last as long as the history of American diplomacy is written. Borrowing the remarks of Dr. Francis Wharton, we would say that "as Secretary of Foreign Affairs in 1781-1783 he did more than any one in the home Government in shaping its foreign policy. But the system he inaugurated was, as will be seen, not the militia system of un-

sophisticated impulse, but that which the law of nations had at the time sanctioned as the best mode of conducting international affairs. On the day he left the office, Congress 'Resolved unanimously, that the thanks of Congress be presented to Mr. Livingston for his services during his continuance in office, and that he be assured Congress entertains a high sense of the ability, zeal, and fidelity with which he hath discharged the important trust reposed in him.' "

The President of the United States, under the Constitution and statutes passed by Congress, is authorized to conduct the foreign affairs of the Government, to make treaties by and with the consent of the Senate, and to appoint ambassadors, public ministers, and consuls by and with the advice and consent of the Senate. But as to inferior officers, the President alone is invested with the power to make appointments.

The Senate of the United States, through its Committee on Foreign Relations, and the House of Representatives, through its Committee on Foreign Affairs and Expenditures in the Department of State, are charged with the consideration of legislation affecting the international relations of the Government. The Senate, in session, advises concerning, confirms, or refuses to consent to the nominations of all diplomatic and consular agents. But treaties, before taking effect through proclamation of the President, must be concurred in by two-thirds of the Senators. All discussions made thereof are preserved in the Executive Journal of the Congress, but not published in the Congressional Record until three sessions of the Senate have intervened, for by this delay any Senator for personal or patriotic reasons can introduce a motion for reconsideration by the Senate.

Some define the word diplomacy as "an artful management or maneuvering with the view of securing advantages and gain-

ing one's ends," while another defines it in these words: "The Ambassador is the man who is sent to lie abroad for the good of his country." Webster defines the word as "the science or art of conducting negotiations between nations." Webster's terminology, "science and art," may be further construed as being such science and art as are daily used by an honest justice of a court in conducting an examination, so that immaterial, irrelevant and incompetent issues may be avoided, and so that there will be nothing but simple truth, honesty, and sincerity. And we might further remark that should any diplomat come to America "to lie abroad for the good of his country," or "maneuvering with the view of securing advantages and gaining one's ends," it is far better for him to leave the country at once.

The difference of rank in persons who serve in foreign courts was systematized by the international congress held in Vienna in 1815, and since then civilized states observe these distinctions: (1) Ambassador, who is sent by one's sovereign to another; (2) Envoy Extraordinary, Minister Plenipotentiary, and Minister Resident; (3) *Chargés d'Affaires*, who are accredited not to sovereigns, but to Ministers of Foreign Affairs or to Secretaries of State.<sup>2</sup> In 1893 the Congress, by law, for the first time authorized the President to elevate our foreign representatives to the same rank as that of the representatives of the countries to which the American diplomats are accredited.

The diplomatic service is generally held to be a distinct profession. To that end, therefore, the aspirant is prepared in youth and by experience through life, and must have a proficient knowledge of French. But the United States seems generally

<sup>2</sup>As to legates or nuncios, who are sent by the Pope of Rome, the United States has neither treaty nor reciprocal understanding regarding sending and receiving such ambassadors. There is stationed in Washington what is called a papal legation, the personal representative of the Pope.

to consider the American language, that is, English, as good a diplomatic language as French or any other language. The term of diplomatic service in America commences and terminates, in almost all cases, with each and every new Presidential term of office. Speaking about this departure from the usual practice of other nations, we would say that so long as the standards of the American diplomat are plain truth, honesty, and simplicity, so long as he honestly decides each and every case that arises in his office, we can see very little reason why the American way is less satisfactory than the practice of other nations. There may be a difficulty in putting absolute truth into practice in the artful world of diplomacy, but we are still ignorant why absolute truth cannot be made a practical fact, even if the diplomatic world of to-day is artful.

The Senators and Representatives of the States generally endorse the candidates for the diplomatic service, and often these are appointed, but in most cases the President's friends have the greater preference. When the nominee has been selected by the President, he will refer his name to the Senate for its advice and consent. The Senate, however, after it has examined the qualifications and character of the nominee, generally gives its consent to whomever has been selected by the President; but there have been many occasions when, for political reasons, the Senators have used their Constitutional right of advice and consent to the fullest extent of the words and have rejected the Presidential wishes. If the Senate consents to the nomination, the nominee takes the oath of office and receives his commission and credentials signed by the President and countersigned by the Secretary of State. He carries with him the Presidential address to the ruler or the foreign sovereign, which expresses the President's wishes for the welfare of the foreign sovereign, and states that he reposes great confidence in the zeal, ability,

and discretion of the diplomat, and that he hopes that all faith and credit will be given him. Reaching the foreign court, the diplomat is presented to the sovereign according to the customs of the particular court.

But when foreign diplomats come to this country they at once notice the characteristic peculiarities of a typical democracy in this country of diplomats. Here, when the appointed time comes, the Secretary of State<sup>3</sup> accompanies the foreign representative to the Red Room of the White House, when the President is notified and then comes down to the Blue Room in everyday dress. In other countries, the sovereign, in receiving a foreign representative, attires himself in robes of state; here, the President wears a Prince Albert, cutaway, or sack coat—whichever he happens to be wearing at that time. There, the dress of the sovereign often glares with a gorgeous manifestation of his great importance; here, the President's appearance often falls below even that of employees working in the street shopping store. The newly arrived diplomat reads his address, the President reads his reply, and then there is a shaking of hands all around.

The consular service of the United States is entirely apart from the diplomatic service. Since the treaty of amity and commerce with France in 1778, the United States had the right of establishing there a consular service and sending their representatives at once, but this country for a time left the consular duties to the diplomatic agents. The condition of the consular service during the Revolution is well illustrated by the words of Dr. Franklin in 1779, when he advised and requested Congress that consuls be appointed. He said in this connection: "Captains are continually writing for my opinion or leave to do this or that, by which much time is lost to them and much

<sup>3</sup>Sometimes an Assistant Secretary will act in place of his superior.



of mine taken up." The first appointment of consuls was made by Mr. Jefferson under the authority of the new Constitution, though not authorized by Congress. In 1792, however, the first law relative to the consular service was enacted. But this law, it is reported, was more to carry into effect the agreement of the Consular Convention of Paris in 1788, in which Mr. Jefferson, who had then succeeded Minister Franklin, participated. It may be rightly said that the first attempt of systematizing the consular service of the United States was made in 1816, but the perpetuation of the service was not fully provided for and the power of the President to appoint was not authorized until 1858. In that year a statute of Congress provided that the men in the consular service must be competent. To that end the pupil system was legally recognized in that law.

The realization of the fact that American development and prosperity is largely due to the efficiency of the commercial agents or consular staffs impelled the American people gradually but surely to revolutionize the service. Meantime they recognized that the consular service of a nation cannot be improved by its national laws or regulations alone. This is exactly the case of the "man behind the gun." A consul's knowledge, attainments, and personal character at home must stand the test abroad. He cannot be any better man than he was before being consul, and his appointment does not change his learning and efficiency. A consul is not by any means a diplomatic agent; he has no special official dignity different from that of the rest of the people in the city wherein he has his office. He is not expected to be entertained or to entertain in social functions, except in accordance with his personal desires. When an American consul is appointed, he goes to the country to which he is sent and receives an *exequatur* from the Foreign Office. Then he signs the receipts in duplicate for the records or properties



of the Consulate—one being sent to the Department of State and the other being kept by the Consulate. As customary, he calls on the officials of the municipality, and calls upon or notifies the consuls from his own country and the consuls from other countries.

Notwithstanding the fact that the American consular service regulations have been subjected to criticism within this country, the American consuls abroad stand high in the esteem of other national consuls, and have been looked up to as the imitative models of consuls by the countries in which they are found. Here, again, we notice the national character playing an important part, for the American consul, like the private citizen at home, must stand on his own merit, and not upon the undesirable theory that his relatives or friends at home will help him if necessary.

The Department of State—a great office it is. It controls and directs all diplomatic and consular staffs abroad, and the foreign diplomatic and consular officers come under it as well. The State Department is not only the publisher of the Federal statutes, but the authorized custodian of all archives. It is the office where the history of American diplomacy has been written and is being written. The Secretary of the Department of State is not only responsible for all these intricate, delicate, and complicated diplomatic functions of the Government, but as a private citizen he has far more important duties than one would suppose. Since he is entrusted with the utmost responsibility in carrying out the Presidential foreign policy, and since the Secretary as a member of the Cabinet stands first in dignity, it is therefore natural that the office be given to a foremost man of the country, as well as to one of the President's own political party and one of his best friends.<sup>4</sup>

<sup>4</sup>Sometimes the Secretary of State has been the President's most

In the history of the American advance, the State Department is entitled to a great share of credit. America started its career with neither trained diplomats nor experienced consular staffs, with neither a sufficient army nor navy, yet battling with the powerful nations of Europe, most of whom were already credited with the making of the law of nations and with the regulation of the use of fighting machines and powder.

In every diplomatic controversy with these nations the Americans came out victorious. The Department of State, controlled hitherto by the most efficient of American diplomatic products, whether Secretaries, diplomats or consuls, backed up also by the untiring officers of ability in the department, has elevated the national honor, prestige, and standing to a higher level with each diplomatic question that came to its notice, until to-day the nation has become powerful in army and navy, in prosperity unparalleled, and in wealth the greatest on the face of the earth, yet withal the most modest of all nations.

prominent competitor for the party nomination. Mr. Lincoln appointed Mr. Seward, who had come next after him in the selection by the Republican party of a Presidential candidate.

PART IV  
THE COURTS



## CHAPTER XVIII

### THE COURTS

The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress shall from time to time establish.—*Article 3, Section 1, U. S. Constitution.*

THE legislative, executive, and judicial powers of every well-constructed government are co-extensive with each other; that is, they are potentially co-extensive.<sup>1</sup> In other words, the executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law. All governments which are not extremely defective in their organization must possess within themselves the means of expounding as well as of enforcing their own laws. If we examine the Constitution of the United States we find that its framers kept this great political principle in view. The first article vests all legislative powers in Congress; the second article vests the whole executive power in the President; and the third declares that "the judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office."

<sup>1</sup>9 Wheat. 738.

We should understand thoroughly that the Constitution of the United States was ordained and established, not by the States in their sovereign capacities, but emphatically, as the preamble of the Constitution declares, by "the people of the United States." And we should also understand that there can be no doubt that it was competent for the people to invest the general Government with all the powers which they might deem proper and necessary, to extend or restrain these powers according to their own good pleasure, and to give them a paramount and supreme authority. The language of the third article of the Constitution, which creates and defines the judicial power of the United States, is the solemnly declared language of the whole American people, establishing one great department of government which is national and in its sphere supreme. It is a part of the very same instrument which was to act, not merely upon individuals, but upon States, and to deprive them altogether of the exercise of certain powers of sovereignty, and to restrain and regulate them in the exercise of others.

Should any of our readers question the absolute authority of the judicial power, let him notice the expression, "shall be vested." The first article declares that all legislative powers herein granted "shall be vested" in a Congress. The second article declares that the executive power "shall be vested in a President." And the third article declares that "the judicial power of the United States shall be vested in one Supreme Court," etc.

It is as absurd to have this phrase construed to mean that Congress may vest the judicial power in the President as that the Supreme Court may vest the legislative power in the President. Such construction as to any one of the departments of government is utterly inadmissible and unthinkable.

\* It is also under this plain provision of the Constitution that



the judiciary is protected from attacks by the other co-ordinate branches of government in respect to its financial remuneration. The framers of the Charter were extremely anxious in this respect, as they by this provision virtually say to those who exercise the legislative and executive authorities in matters of raising or expending national funds that they must be careful in regard to the judges' salaries. Their attractive and tempting powers shall not be used to diminish the judges' compensation; but they are allowed to increase it in view of the changes in money value and in society itself.

Those who exercise their powers for the well-working of the machinery of the other departments of the Government must recognize this limitation as well as their oath to support the Constitution when they enter upon their allotted duties. That the judges' salaries can be increased, but not diminished, is an admirable provision, because it is one of the great securities of judicial independence.

The sole requirement of good behavior as a condition for the continuance in office of the judicial magistracy is certainly one of the most valuable of modern regulations in the practice of government. In a monarchy, it is an excellent barrier against the despotism of a prince; in a republic, it is no less an excellent barrier against the encroachments and oppression of the representative body. And it is the best expedient which can be devised by any government to secure the steady, upright, and impartial administration of the law. This provision that the judges shall hold office during good behavior secures to them more independence than the judges of foreign countries have. Japan, without doubt, does secure judicial independence, it being inscribed in the Imperial Constitution that "no judge shall be deprived of his position, unless by way of criminal sen-

tence or disciplinary punishment.”<sup>2</sup> But it is debatable whether the laws of a national legislature which may be enacted from time to time shall govern the judicial office. In America, judicial independence, because it is a creature of the Constitution, is secured over and above the laws of Congress. The Japanese “Judicature,” says the Constitution, “shall be exercised by the courts of law according to law, in the name of the Emperor”; and in the specification, “according to law,” much like the specification in Germany, the judges of Japan as well as of Germany find justice prescribed for them. The position of the Federal judges of America, we may be sure, is better protected than that of the judges of England. In the latter country the judges may be removed by the Crown on an address from both houses of Parliament. Whatever rules the American Supreme Court may have evolved for itself within its sphere, it is not required, as is the English Supreme Court of Judicature, to submit to the possibility of being removed by the Crown on an address from either house.<sup>3</sup>

Whoever attentively considers the different departments of government must perceive that in a government in which the powers are separated from each other, the judiciary, from the nature of its functions, will always be least dangerous to the political rights of the Constitution, because it has the least capacity to annoy or injure them. The Executive not only dispenses the honors, but holds the sword of the community; the Legislature not only commands the purse, but it prescribes the rules by which the rights and duties of every citizen are to be regulated; the judiciary, on the contrary, has no influence over either the sword or the purse, no direction either of the strength or of the wealth of society, and no initiative whatever. It may truly be said to have neither force nor will, but merely judg-

<sup>2</sup>Art. LVIII, Japanese Const.

<sup>3</sup>Leby, Foulkes, Judicature Acts.

ment, and must ultimately depend upon the aid of the executive arm for the efficacious exercise of even this faculty. The inherent weakness and helplessness of the judicial arm of the Government has been proved by the fact that the Federal courts have remained inactive in certain cases in the history of this country.<sup>4</sup>

It is further said that the judiciary is next to nothing, that it can never attack with success either of the other two powers, and that all possible care is requisite to enable it to defend itself against their attacks. Though individual oppression may now and then proceed from the courts of justice, the general liberty of the people can never be endangered from that quarter as long as the judiciary remains truly distinct from both the Legislature and Executive.

In the last place, as liberty can have nothing to fear from the judiciary alone, but would have everything to fear from its union with either of the other departments, as all the effects of such a union must ensue from a dependence of the former on the latter, notwithstanding a nominal and apparent separation, as from the natural feebleness of the judiciary it is in continual jeopardy of being overpowered, awed, or influenced by the Government's co-ordinate branches, and as nothing can contribute so much to its fairness and independence as permanence in office, this quality may, therefore, be justly regarded as an indispensable ingredient in its constitution, and in a great measure as the citadel of public justice and public security.

Whenever a vacancy occurs on the Federal bench, either by death or retirement, the President selects the new judge with the confirmation of the Senate. As the President himself is selected by partisan vote, his selection of judges, with but few exceptions, has usually been from among the party to which

<sup>4</sup>203 U. S. 563; 5 Pet. 1; 6 Pet. 515; 21 How. 506; 192 U. S. 286.

he belongs. But this fact does not warrant us in assuming that party conceptions figure in their decision of the cases which are presented to them. On the contrary, it is a mistake for us to indulge such suspicions for a moment. There have been no instances in which it has been substantially proved that the judges harbored any political schemes or attempted in their decisions to favor either party—Democratic or Republican—according to the views of the party from which they had been chosen. The history of the Federal bench during more than a century proves beyond dispute that it has been a most shining example of American virtue. Federal courts have proved that they possess strength and impregnability beyond the approach of factions. The American people look to these tribunals as the true safeguard from the assaults of the many against the few, of the rich against the poor, of the majority against the minority, and of party against party. The positions of the Federal judges, of all the offices in the co-ordinate branches of the Government, not excepting even the President in the Executive Mansion, are those of the greatest envy and respect.<sup>5</sup> We would warn against those criticisms that are often indulged in whenever the judges are divided in deciding important cases. We would warn those who look upon the Federal bench with suspicion whenever there has been a decision by a close vote. Remember that if a vote of five to four was maintained in deciding an important case, it was so maintained simply because the judges thought justice demanded it, and their obligations to God and man. If a great and important case attracts the

<sup>5</sup>President Roosevelt said at a gathering of the members of the Washington Bar: "It is sometimes a good thing to be heard first. It is always a good thing to have the right to speak last. That right belongs to the Supreme Court. The President and Congress are all very well in their way. They can say what they think, but it rests with the Supreme Court to decide what they have really thought."

attention of the whole people and the interests of many be involved in the decision thereof, it is but natural that the decision excite intense feeling among the populace. We are but human and we cannot condemn the general regret felt by those who are disappointed by an adverse decision. We do not find fault that such regret often culminates in almost condemning the judges, and sometimes amounts to criticisms and attacks on the entire judicial system of the country. But we do blame those who express their suspicions and cast doubt on the honesty of the judges. We do blame those also who indulge in the imputation that there is a lack of intelligence, veracity, and integrity among the judges of the United States. No greater wrong than that against the honor of the nation has been done. These people lower the respect for the American system of government from without and also shake the confidence of the citizens from within. It is a self-evident fact that they will not only cause the degradation of their own country in the eyes of foreign nations, but will also jeopardize the vitality of their national life.

Public opinion in America, as the nature of the people directs it, has much greater weight than anywhere else in the world. It is also true that our Government is the Government of, for, and by the people. But, on that account, we should never expect the judges to yield to popular clamor until the Federal Constitution is amended by the people to express their wishes. With due respect, we dissent from the opinion of our learned English predecessor who states that "to yield a little may be prudent, for the tree that cannot bend to the blast may be broken." We also differ from the German sentiment: "That party conceptions figure somewhat in the decision of the judges is undoubted."

The executive and legislative branches of the Government



may reasonably be expected to be carried away by public opinion and to believe that "to yield a little may be prudent." Party conceptions do figure in their decisions. But with respect to the judiciary, the contrary policy must be considered a splendid prudence, and that it is so is undoubted. The judges have neither occasion nor necessity for such a course. Above all, it is not proper for them to commit themselves on any party conceptions which may later be brought to tip the scale in the decisions of the court. The American judges have characteristics peculiar to themselves, differing widely from judges in foreign countries. In foreign countries the people look to the judges to decide cases on the laws properly enacted by the Legislature or by those who are competent to legislate; but in America the citizens look to the judges to decide their cases according to the Constitution, rather than according to the laws. The American judges have a special right that other national judges have not—the right to pronounce the laws null and void whenever they find them unconstitutional. We would emphasize the majesty of the American judges in the expression that they are "the very symbol of conscience." We want to leave our understanding of the Federal courts and judges well settled in our readers' minds. In doing so, we find no better words than those of Mr. Justice Brewer when he said:

"A judge, like any other person, is likely to make mistakes. He is none the less the man because he is invested with judicial office. He has the limitation of finite nature. There is no infallibility in the rulings of a court. We all recognize that. We make allowances for it; but the moment we feel that a judge has sacrificed his convictions to demands of interested friends or to a present popular clamor, that moment he becomes disgraced in our sight. We not merely regret his mistake; we despise his cowardice."



## CHAPTER XIX

### THE FEDERAL AND STATE COURTS

**I**N 1778, when the Articles of Confederation were ratified, it was agreed that "each State retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right," and that it owed no duty to and intended to recognize but little the binding force of the National Government. When, on the seventeenth day of September, 1787, the present Constitution was ratified, the Federal judicature at once commenced its majestic operation. The detached body of the judiciary, established by Congress under the Constitutional "inferior courts" clause, was soon extended all over the country.

The State courts, with the exception of those judicial powers granted to the new Government, possessed an absolute independence in regard to the State statutes. As such independent States have increased to forty-six, the State courts have increased in the same ratio. The Federal courts are also established in every State. Citizens of the State thus have a double recourse—to the Federal courts and to the State courts, each of which is composed of judges, lawyers, and jurymen serving under this double jurisdiction and also under this double allegiance. In our investigation of modern legal institutions we are unable to find a more complicated yet more simple and more instructive and fascinating judicial system anywhere in the world than the judicial system of America.<sup>1</sup>

<sup>1</sup>The Federal Courts may be classified as follows: 1. Supreme Court; 2. Circuit Courts of Appeals; 3. Circuit Courts; 4. District

The Supreme Court of the United States sits at Washington, D. C., from October to July every year, and consists of a Chief Justice and eight Associate Justices. It occupies the central chamber of the Capitol, which formerly served as the home of the Senate. The judges sit in their official dress—a long, black gown. Outside of members of the army and navy, the Federal judges are the only officials in the United States who wear a special dress in the execution of their duties.<sup>2</sup> When one looks at the judges on the bench he is inspired with a feeling of veneration, and bows in the full realization of the fact that to them is largely due the credit for the peace and dignity of the people of the United States.

Congress, under its Constitutional authority, has already created fifty-five district courts and nine judicial circuits. Under the act of 1891 the Circuit Court of Appeals was created to handle a part of the cases which formerly came before the Supreme Court, in order to relieve the latter in its ever-amassing business. The Court of Claims was also created, with jurisdiction to hear suits of private individuals against the United States. It sits in Washington, D. C.<sup>3</sup>

Before we proceed further in our study of the separate and distinct spheres of the Federal and State courts, let us here understand some general propositions with regard to them. It is necessary to understand that the Federal and State courts

Courts; 5. Commissioners' Courts; 6. Territorial Courts; 7. Courts of the District of Columbia; 8. Court of Claims. A court of military commission cannot be considered one of the judicial courts. See 1 Wall. 243.

<sup>2</sup>American university and college professors, and sometimes the graduating classes of such institutions of learning, wear gowns. The judges of the inferior Federal Courts also wear this official dress.

<sup>3</sup>The Chief Justice of the Supreme Court receives an annual salary of \$13,000; Associate Justices, \$12,000; Circuit Court Judges, \$7,000; District Court Judges, \$6,000; Chief Justice of Court of Claims, \$6,500; Associate Justices, \$6,000.

are not foreign to each other, but are interdependent, co-operating systems, and together constitute one vast machine of justice, planned and operated in order that a remedy may be had for every wrong, and that protection against the most powerful may be afforded the weakest, without regard to residence or nationality. We must, however, bear in mind that the Constitution of 1787 was neither a supplementary charter to, nor one engrafted on, nor an instrument drawing its nourishment from the State Constitutions. The judicial powers of the Federal courts created by the Constitution are substantial powers, and every provision of that charter is understood in an imperative sense by the people of the United States. These Federal judicial powers, according to Article II, Clause 2, of the Constitution, shall extend:

"1. To all cases in law and equity arising under this Constitution and the laws of the United States.

"2. To all cases arising under treaties.

"3. To all cases affecting ambassadors, other public ministers, and consuls.

"4. To all cases of admiralty and maritime jurisdiction.

"5. To controversies to which the United States shall be a party.

"6. To controversies between two or more States.

"7. To controversies between a State and a citizen of another State.

"8. To controversies between citizens of different States.

"9. To controversies between citizens of the same State claiming lands under grants of different States, and between a State or the citizens thereof and foreign states, citizens, or subjects."

From these Constitutional declarations the judicial department receives jurisdiction when any question respecting any

of the foregoing clauses shall assume such a form that the judicial power is capable of passing on it. That power is capable of acting only when a question is submitted to it by a party who asserts his rights in the form prescribed by law. It then becomes a case, and the judicial power shall extend to "all cases," as declared by the Constitution.

When the judicial power becomes capable of acting, we are instantly confronted with the complicated problem as to what may be taken as a landmark in judging a case which, while it may be within the judicial cognizance of the United States, arises in one of the State courts in the exercise of its ordinary jurisdiction. This problem, however, may be answered by the Constitution itself, the sixth article of which declares that "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." It is urged, however, on the State rights side of the question, that for the Federal courts to hold appellate jurisdiction over the State courts is inconsistent with the genius and spirit of the Constitution, and that the judicial powers of the United States were never designed to materially impair the sovereignty of the States and the independence of their courts. Such contentions have, for years past, been overruled by the impartial and just decisions of the Supreme Court.<sup>4</sup> Suppose a contract for the payment of money is made between citizens of the same State, and performance thereof is sought in the courts of the State; no person can doubt that the jurisdiction completely and exclusively attaches, in the first instance, to such courts. Suppose, at the

<sup>4</sup>1 Wheat. 304.

trial, the defendant sets up in his defense a tender under a State law making paper money a legal tender, or which in any way impairs the obligation of such contract; this tender, if binding, would defeat the suit. But the Constitution of the United States has declared that no State shall make anything but gold or silver coin a legal tender in payment of debts, or pass a law impairing the obligation of contracts. If Congress has not passed a law providing for the removal of such a suit to the courts of the United States, must not the State court proceed to hear and determine it? Can a mere plea of tender under the State statute be of itself a bar to further proceedings, so as to prohibit an inquiry into its truth or legal propriety, when no other tribunal exists to which judicial cognizance of such cases is confided? Suppose there is an indictment for a crime in a State court, and the defendant alleges in his defense that his act was made a crime by an *ex post facto* law of the State; must not the State court, in the exercise of a jurisdiction which has already rightfully attached, have a right to pronounce on the validity and sufficiency of the defense? Innumerable instances of the same sort might be stated in illustration of the position, and it would be extremely difficult upon any legal principle to give a negative answer to such inquiries. But if the State courts could retain exclusive jurisdiction in such cases, this clause of the sixth article would be without meaning or effect, and public mischief of a most enormous magnitude would inevitably ensue.

A saying which may be taken to be as applicable now as then, and which will always be so, is that of Mr. Justice Story: "It is a mistake to say that the Constitution was not designed to operate upon States in their corporate capacities. It is crowded with provisions which restrain or annul the sovereignty of the States in some of the highest branches of their preroga-



tives. The tenth section of the first article contains a long list of disabilities and prohibitions imposed upon the States. Surely, when such essential portions of State sovereignty are taken away or prohibited, it cannot correctly be asserted that the Constitution does not act upon the States. The language of the Constitution is also imperative upon the State as to the performance of many duties. It is imperative upon the State Legislatures to make laws prescribing the time, place, and manner of holding elections for Senators and Representatives and for President and Vice-President. And in these, as well as in some other cases, Congress has a right to revise, amend, or supersede the laws which may be passed by State Legislatures. When, therefore, the States are stripped of some of the highest attributes of sovereignty, and the same are given to the United States; when the Legislatures of the States are, in some respects, under the control of Congress, and in every case are under the Constitution, bound by the paramount authority of the United States, it is certainly difficult to support the argument that the appellate power over the decisions of State courts is contrary to the genius of our institutions." The jurist proceeds: "The courts of the United States can, without question, revise the proceedings of the executive and legislative authorities of the States, and if they are found to be contrary to the Constitution, may declare them to be of no legal validity. Surely, the exercise of the same right over judicial tribunals is not a higher or more dangerous act of sovereign power."

Thus understanding the judicial power in its relation to the States, the next and immediate question arises: "What is the status of a case arising in the State courts within their ordinary jurisdiction, but which involves the judicial cognizance of the United States?" We again refer the question to the Constitution, which invests Congress with the power to enact laws



for the removal of cases from the State courts to the Federal tribunals. For example, Congress shall have power "to make all laws which shall be necessary and proper for carrying into execution" the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof. The right of removal is included in this appellate jurisdiction, because it is one mode of exercising the above power, and as Congress is not limited by the Constitution to any particular mode or time of exercising it, it may authorize a removal either before or after judgment. The time, the process, and the manner of removal must be subject to the absolute judgment of the legislative department. A writ of error is simply a process which removes the records of one court to the possession of another court, and enables the latter to inspect the proceedings and to give such judgment as its own opinion of the law and the justice of the case may warrant. This remedy of the removal of suits acts not only on the parties, but also upon the State courts.

Understanding that Congress has the unquestionable right to provide laws which authorize the removal of all cases within the scope of the Federal judicial powers from the State courts to the Federal courts; understanding that the judges of the State courts are, and always have been, practically as learned, honest, and wise as those of the Federal courts; understanding that the judges of the State courts are bound by oath to support the Constitution of the United States—it is manifest that they will acquiesce whenever appellate jurisdiction is exercised within the judicial powers granted to the Federal courts by the Constitution. And if the judges of the State courts should unintentionally transcend their authority or misconstrue the Constitution, the judgments of the Federal courts upon such points are taken as absolute and of irresistible force. They

recognize the fact that the Constitution has given or withheld powers according to the judgment of the American people, by whom it was adopted; and the judges of the State courts will echo, in the language of the Federal Supreme Court: "We dare not interpose a limitation where the people have not been disposed to create one."

However, as we have warned our readers at the outset, the Federal and State courts are not foreign to each other. They are interdependent, co-operating systems, and together constitute one vast machine of American justice.

We will now attempt to illustrate the dividing lines between the adjudged cases, each of which will show the principles underlying our present inquiries, although some may be of the past and others of more recent times.

Suppose we should sue in a State court the United States marshal whose duty it is to execute the process of the courts of the United States—whose duties within the district for which he is appointed are very similar to those of a sheriff.<sup>5</sup> Suppose we sue him in trespass for taking our goods, and he should plead that he did it under his authority as a marshal of the United States, and the State Supreme Court finds him guilty, and he thereupon removes the case from the State court to the Supreme Court of the United States upon error. The Supreme Court of the United States held in such a case that the marshal was guilty of trespass in levying upon the property of one against whom the process of the Federal court did not run, and the mere fact that the Federal court issued the writ could constitute no defense.

<sup>5</sup>Each State of the United States is divided into so many counties. The people of the several counties usually elect sheriffs, whose duties are to preserve the peace within their respective counties. There is a similarity between a sheriff's duties and those of the policemen in a city.

The judgment in a similar case against a marshal was reviewed in the Federal Supreme Court under an act of Congress authorizing such review in cases where a party specially claimed the protection of the authority exercised under the United States. But the Supreme Court decision denied the protection so claimed.<sup>6</sup> Against the above example as a case in which the State authority was upheld we will now present a case in which the State authority was denied.

One Parkins sued United States Marshal Boch in the State court. The damage claimed against the marshal was that he seized a certain stock of goods under an attachment issued from the Federal Circuit Court. The case was removed to the Federal court, to which removal, however, Parkins objected, and moved in the Federal court to remand it to the State court. The Federal judge denied the motion and the jury returned a verdict for the marshal. The case then came up to the Supreme Court of the United States. There was no question as to the rightful execution by the marshal of the lawful precepts given to him. The Supreme Court therefore held that the marshal was in the discharge of duties imposed upon him by the laws of the United States. And, as it was a case arising under the laws of the United States, the case was not only removable from the State to the Federal court, but it was also a case properly belonging within Federal jurisdiction.<sup>7</sup>

Let us proceed a step further in our present study and endeavor to still more clearly understand it. It was held by the Supreme Court that "No act can be a crime against the United States which is not made or recognized as such by the Federal Constitution, law, or treaty." But the Federal courts sitting in the several States, where their jurisdiction depends upon the character or residence of the parties who sue or are sued,

<sup>6</sup>3 Well. 334.

<sup>7</sup>139 U. S. 628; 135 U. S. 1.

administer for the most part the local law, and take notice of the State common law, usages and statutes, and apply them as the State courts would apply them in like controversies. In all cases where the decisions of the State courts afford precedents for their guidance, the Federal courts follow them for the sake of uniformity. The State decisions thus become the final rule and authority on questions of State law for like reasons to those which require finality to Federal decisions on questions of Federal law. But there are certain cases in which this rule cannot be applied, because the reasons on which it rests are inapplicable. It cannot, for example, be applied in any case where the decision of the State court involves a question of national authority, or any right, title, privilege, or exemption derived from or claimed under the Constitution, or any law or treaty of the United States.

In times of great agitation, however, a great crisis often arises to test the courts' fidelity to the Constitution. Take, for instance, the case of a famous Cherokee Indian who, having been sentenced to death by the State court, appealed to the Supreme Court, claiming his case to be triable in the Federal court under the treaty between the Indians and the United States. The Supreme Court thereupon issued a writ commanding the State court to make up and certify the record of its proceedings. However, the State Legislature adopted a resolution authorizing the Governor, "with all the force and means placed at his command by the Constitution and laws of the State, to resist and repel any invasion from whatever quarter upon the administration of the criminal laws of the State."<sup>9</sup> As a result of this action, the Supreme Court took no further steps to enforce its authority.

An American missionary, later on, entered the Indian terri-

<sup>9</sup>5 Pet. 1.

tory to preach the gospel, and was arrested and convicted and sentenced for some years in the State penitentiary for not having first obtained the necessary license. The preacher applied to the Supreme Court of the United States for a writ of *habeas corpus*. Thereupon the court decreed that the preacher "be and he hereby is henceforth dismissed," and that he go acquitted thereof "without day."<sup>10</sup> In discussing the power of the court to enforce its decree in this case, G. C. Lay, quoting Kennedy in his life of William Wirt, recently says: "The Governor of Georgia is said to have declared that he would rather hang the missionaries than liberate them under the mandate of the Supreme Court."<sup>11</sup> Nothing was left for the prisoners but to wait for a day of cooler judgment and more moderate counsel. After some eighteen months, that day arrived. The contest had grown hopeless to the State, as the weaker party, and so the missionaries were released. But Georgia's position was not without its advocates in even later days. In time of a popular uprising, Wisconsin, Kentucky, and Louisiana followed in the footsteps of their predecessor.<sup>12</sup> At the present time, in 1906, in the Chattanooga incident, the Supreme Court was not without experience, as it was in the Georgia case in the olden time.

Whenever the State authority takes a determined stand, legal literature is enriched, and the students of the theory of "indissoluble States" are greatly indebted for the contest. But we do not mean to approve of the State's position in the least, although we are thankful for the opportunity given us, as students, to understand how such a thing is possible. When the Supreme Court does not take notice of an application for relief, the State authority then seems to be the stronger; but at the moment when the court does take hold of the case, then, practi-

<sup>10</sup>6 Pet. 515.<sup>11</sup>*Am. Law Rev.*, XLI, 4.<sup>12</sup>21 How. 508.



cally and theoretically, the whole force of the nation is at its back.

In the general study of the so-called conflict between the national and State rights, there is to be found no better consolation than the words of Justice Harlan: "What, let me ask, are the grounds upon which the pessimist of these days bases his fear for the safety of our institutions? He persuades himself to believe that the trend in public affairs to-day is toward the concentration of all governmental power in the nation and the destruction of the rights of the States. If this were really the case, the duty of every American would be to resist such a tendency by every means in his power. A national government for national affairs, and a State government for State affairs, is the foundation rock upon which our institutions rest. Any serious departure from that principle would bring disaster upon the American people and upon the American system of free government. But the fact is not as the pessimist alleges it to be. The American people are more determined than at any time in their history to maintain both national and State rights as those rights exist under the Union ordained by the Constitution." The distinguished jurist continued: "The best friends of State rights, permit me to say, are not those who habitually denounce as illegal everything done by the general Government, but those who recognize the Government of the Union as possessing all the powers granted to it in the Constitution, either expressly or by necessary implication; for without a general government possessing such powers in relation to matters of national concern, the States would be in perpetual conflict and lose their prestige before the world."<sup>14</sup> When we have such an exposition by this great jurist at hand, we are at a loss as to

<sup>14</sup>Harlan's Address before the Kentuckian Club, New York City, Dec. 23, 1907.



why the Federal judicial order is ever disobeyed by the State government.

To explain this puzzling question, let us remember just what is necessary before a case reaches what we call State disobedience to a Supreme Court order. We here present the recent and most implicit instructions of the Supreme Court as to what constitutes such disobedience and which should therefore be avoided. Mr. Justice Holmes, speaking for the Supreme Court, declares that "the order suspended further proceedings by the State against the prisoner and required that he should be forthcoming to abide the further order of this court. It may be found that what created the mob and led to the crime was the unwillingness of its members to submit to the delay required for the trial of the appeal. From that to the intent to prevent that delay and the hearing of the appeal is a short step. If that step is taken, the contempt is proven."<sup>15</sup>

The declaration of the United States Constitution that "the judicial power shall extend to all cases in law and equity" arising under this authority is understood to cover all cases, whether civil or criminal, both of which fall equally within the domain of the judicial power of the United States. Whatever power may be exercised over a civil case may be exercised over a criminal case. The Constitutional powers can act only through Federal officers or agents, and they must act within the boundaries of the States. If, when thus acting within the scope of their authority, those officers can be arrested and brought to trial in a State court for an alleged offense against the law of the State, although warranted by the Federal authority they possess, and if the general Government is powerless to interfere at once for their protection—if their protection must be left to the action of the State court—the operations of the general Government

<sup>15</sup>203 U. S. 563.

may at any time be arrested at the will of one of the members of the United States. It is not material whether the legislation of the State be friendly or unfriendly to the United States.<sup>16</sup> The paramount authority of the nation is expressed in the language of Mr. Justice Strong: "We do not think such an element of weakness is to be found in the Constitution. The United States is a Government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme."

<sup>16</sup>100 U. S. 257.

## CHAPTER XX

### TREATY

FROM the very outset of the career of the United States as a nation its courts have stood the severest tests in their construction of matters with respect to international law. It took the most powerful eloquence and reasoning faculties of men to secure the adoption of the Constitutional provision that "judicial power shall extend to all cases arising under this Constitution, the laws of the United States, and *treaties* made or which shall be made, under their authority."

The first and most debated problem in the annals of the Federal courts was the taking effect of the Treaty of Peace. In 1782, by an act of confiscation, a bond which had been given in 1774 by Kelsall and Spalding to Brailsford and others, alleged aliens, had been sequestered to the State of Georgia. Brailsford and his co-partners had brought suit on the bond in 1791 in the United States Court for the District of Georgia. The State had applied for permission to assert its claim, and judgment having been entered for the plaintiff, the State now filed her bill in equity in the Supreme Court, praying that the United States marshal should be directed to pay over the money in his hands to the Treasurer of the State.<sup>1</sup> The court, in rendering its unanimous opinion, said that the act of Georgia did not vest the debt in the State at the time of passing it; that it was subject, not to confiscation, but only to sequestration, and the owners' right to recover it revived after the Treaty of Peace.<sup>2</sup>

<sup>1</sup>2 Dall. 402.

<sup>2</sup>3 Dall. 1.

This decision may not be such a voluminous one, yet it appears to be a most important and far-reaching one, involving as it does a vital principle in the construction of treaties, namely, that they are the supreme law of the land. At the same time, this decision set forward in bold relief the principle that the State action and laws could not restrict the terms of a treaty. It was a much-discussed problem of the period, in which discussion we see debaters such as Patrick Henry, John Marshall, Iredel, Johnson, Chase, Paterson, Wilson, Cushing, and others. They finally arrived at the conclusion that the Treaty of Peace of 1783 must override all effects of sequestration, confiscation, or any other things that tend to jeopardize the treaty obligations of the new-born nation of America. We present this case and its decision because it involves the conclusion that if the provisions of the treaty had been jeopardized then, the very independence of the United States would have been jeopardized.

By the Constitution, a treaty is placed on the same footing and made of like obligation with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always that the stipulation of the treaty on the subject is self-executing.<sup>3</sup>

As to a conflict between an act of Congress and a treaty in force when the act was passed, the act of Congress will prevail in a judicial forum.<sup>4</sup> Justice Miller has said in this respect that "a treaty is made by the President and the Senate. Stat-

<sup>3</sup>1 Cranch, 138; 124 U. S. 190; 11 Wall. 616; 112 U. S. 580.

<sup>4</sup>2 Curtis, 454; 18 Fed. Rep. 28.

utes are made by the President, the Senate and the House of Representatives. The addition of the latter body to the other two in making a law certainly does not render it less entitled to respect in the matter of its appeal or modification than a treaty made by the other two. If there is any difference in this regard, it would seem to be in favor of an act in which all three of the bodies participated. And such is, in fact, the case in a declaration of war, which must be made by Congress, and which, when made, usually suspends or destroys existing treaties between the nations thus at war.”<sup>5</sup>

Let us now turn to the State and see the question from its viewpoint. We are yet to find any better construction of the status of a treaty in the State courts than that of the Supreme Court of the State of California, relating, as it does, to the question as to how far the State submits its own internal policies to the control of the Federal Government. In the language of Mr. Justice Heydenfeldt, we would say: “Now, as by the compact the States are absolutely prohibited from making treaties, if the general Government has not the power, then we must admit a lameness and incompleteness in our whole system, which renders us inferior to any other enlightened nation, in the power and ability to advance the prosperity of the people we govern. Mr. Calhoun, in his discourse on the Constitution and Government of the United States, has given to this power a full consideration, and I cannot doubt that the view which I have taken is sustained by his reasoning. According to his opinion, the following may be classed as the limitations on the treaty-making power: First, it is limited strictly to the question *inter alias*, ‘all such clearly appertain to it.’ Second, ‘by all the provisions of the Constitution which prohibit certain acts to be done by the Government or any of its departments.’ Third,

<sup>5</sup>112 U. S. 580.

'by such provisions of the Constitution as direct certain acts to be done in a particular way, and which prohibit the contrary.' Fourth, 'it can enter into no stipulation calculated to change the character of the Government, or to do that which can only be done by the Constitution-making power, or which is inconsistent with the nature and structure of the Government or the objects for which it was founded.' Even if the effect of this power was to abrogate to some extent the legislation of the States, we have authority for admitting it, if it does not exceed the limitations which we have cited from the work of Mr. Calhoun, and laid down as the rule to which we yield our assent. I can see no danger which can result from yielding to the Federal Government the full extent of the power which it may claim from the plain language, intent, and meaning of the grant under consideration. Upon such subjects the policy of foreign governments would be readily changed upon the principles of mutual concession. This can only be effected by the action of that branch of the States' sovereignty known as the general Government; and when effected, the State policy must give way to that adopted by the governmental agent for her foreign relations."<sup>6</sup>

The Japanese school question of San Francisco now occupies a more than exaggerated place in the arena of international history. Exaggerated, we say, because we believe the question properly belongs, not to the international domain, but to the American National Constitutional province. Let us see. However, in presenting our view, we except the immigration question, which for some time before and some time after the school case was being negotiated between the two nations, the terms of which treaty, we hope, will always be carried out amiably, mutually, and satisfactorily. Before we present wherein we

<sup>6</sup> Cal. 381. See Calhoun, "Discourse on Const. and Gov.," 1851.



differ from the general understanding of the school question, it may be a useful thing to here produce four different views taken of the matter by those who have actually participated in it: First, the view of the School Board of San Francisco, in a measure supported by the State and inhabitants of California; second, the view of the Japanese Ambassador and Consul; third, the view of the President Roosevelt administration, in a measure supported by the national authorities; and lastly, the author's view, based upon his knowledge as attorney for some of the expelled pupils of the San Francisco school.<sup>7</sup>

The School Board contended: (1) The treaty between this country and Japan does not guarantee the Japanese the right of education expressly or impliedly, in public or private schools; nothing except the right of travel and residence. (2) Even though the Japanese have had such rights, as they are furnished equivalent facilities, they are not in the least discriminated against compared to other pupils. (3) Even though the Japanese had a right to claim the privileges of receiving education under the treaty, they have no more rights and privileges than the citizens of the United States, such as colored or Indian children. (4) The Japanese-American Treaty of 1894 expressly provides that "this and the preceding article do not in any way affect the laws, ordinances, and regulations with regard to police and public security." The regulation of the School Board is the police and public security regulation which the State, under

<sup>7</sup>The author filed a petition in the Circuit Court of the United States for a writ of mandamus against the San Francisco School Board in behalf of an expelled pupil, I. Yasubara. Later, Attorney-General Bonaparte and U. S. Attorney Devlin filed a petition for a writ of mandamus in the State Supreme Court in behalf of K. Aoki. Both of these cases were withdrawn after the readmission of the Japanese pupils to the school, and Japanese laborers in return excluded themselves from coming from the insular possessions to the continental territory of the United States after the 20th of February, 1907.

the Constitution of the United States, is expressly authorized to establish by the provision that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people." And that the regulation of public security by the police power in the State is one of the reserved powers of the States needs no argument.

The Japanese Ambassador and Consul seemed to contend: (1) That the rights of the Japanese residents under the treaty of 1894 are internationally infringed, because the said treaty in substance provides that the citizens or subjects of each of the two high contracting parties shall have full liberty . . . to travel and reside in any part of the territories of the other contracting party. . . . In whatever relates to rights of residence . . . the citizens or subjects of each contracting party shall enjoy in the territories of the other the same privileges, liberties, and rights. (2) That the rights and privileges of education are necessarily incident to the right of residence. (3) That the subjects or citizens of Great Britain and Germany or other nations are not segregated—none except the subjects of the Empire of Japan. Therefore, the School Board regulation excludes Japan alone from equal treatment as accorded her under the treaty of the most favored nation.

The view of the American administration, taking into consideration the petition for the writ filed by Attorney-General Bonaparte and the remarks of Secretaries Metcalf and Straus of the Department of Commerce and Labor<sup>s</sup> and those of Sec-

<sup>s</sup>Secretary Metcalf was the Secretary of the Department of Commerce and Labor when the case first arose, and he was the President's special representative to go to San Francisco for the investigation. Secretary Straus became the Secretary of the Department when Mr. Metcalf, after returning from San Francisco, was appointed Secretary of the Navy. It was then that the discussion of the question was at its height.

retary Root, seemed to be: (1) That the United States and the Empire of Japan have entered into a treaty . . . which is in full force and effect. (2) That the legislation of the State of California, the resolution of the Board of Education, and the action of the respondent constitute a denial to the Japanese pupils of those privileges, liberties, and rights which are granted by the State of California and by the Board of Education of San Francisco to the subjects or citizens of the most favored nations. (3) That the United States has at various times made grants of land and appropriated money to the State of California for the support of the public or common schools of said State, the provision for which was made by an act of Congress approved June 27, 1906. (4) That the city whose regulation is now preventing the Japanese children from attending school is the same city which, a few months ago, when the late catastrophe visited it, accepted ten thousand dollars from Japan for the relief of the city and its people. (5) That a nation cannot offend another nation and hold the trade of its people, any more than an individual merchant or manufacturer can expect to hold customers whom he openly offends or brutally insults. International courtesy is as essential to international good will as is a similar attitude between individuals, while the consequences in the former case are far more serious and permanent. (6) It is assumed that in asserting the validity of the treaty of 1894 the United States is asserting the right to compel the State of California to admit Japanese children to its schools. No such question is involved. That treaty does not, by any possible construction, assert the authority of the United States to maintain public schools, or to extend the privileges of the State public schools to Japanese children or to the children of any alien residents. The treaty does assert the right of the United States to assure to the citizens of a foreign nation resid-

ing in American territory equality of treatment with the citizens of other foreign nations; so that if any State chooses to extend privileges to alien residents as well as to citizen residents, the State will be forbidden by the obligations of the treaty to discriminate against the resident citizens of the particular country with which the treaty is made and will be forbidden to deny to them the privileges which it grants to the citizens of other foreign countries. The effect of such a treaty, in respect to education, is not positive and compulsory; it is negative and prohibitory. It is not a requirement that the State shall furnish education; it is a prohibition against discrimination when the State does choose to furnish education. It leaves every State free to have public schools or not, as it chooses, but it says to every State: "If you provide a system of education which includes alien children, you must not exclude these particular alien children."<sup>9</sup>

Lastly, we will give our view. On the 11th of October, 1906, was passed the School Board resolution: "Resolved, That, in accordance with Article I, Section 1662, of the school law of California, principals are hereby directed to send all Chinese or Korean children to the Oriental public school, situated on the south side of Clay Street, between Powell and Mason streets, on and after Monday, October 15, 1906." This resolution was, however, the fulfillment of the previous resolution of the Board, dated the 6th of May, 1905: "Resolved, That the Board of Education is determined in its efforts to effect the establishment of separate schools for Chinese and Japanese pupils, not only for the purpose of relieving the congestion at present prevailing

<sup>9</sup>The school question in its relation to the treaty-making power; see Prof. Simon E. Baldwin's article, *Col. Law Rev.*, Feb. '07; Prof. William D. Lewis, *Am. Law Reg.*, Feb. '07; Prof. C. C. Hyde, *Green Bag*, Jan. '07; T. Baty, *London Law Mag. and Rev.*, Feb. '07; T. P. Ion, *Mich. Law Rev.*, Mar. '07; A. K. Kuhn, *Col. Law Rev.*, Mar. '07.

in our schools, but also for the higher end that our children should not be placed in any position where their youthful impressions may be affected by association with pupils of the Mongolian race." When the San Francisco School Board passed these resolutions we thought them a small, local question. We were surprised at the action of the outside people in stretching this question to the extent of the earth's surface. When the resolution of the Board was read by the school teachers to the Japanese pupils at the schools, the latter, with their relatives and guardians, say about thirty-five, called at the author's office by appointment, and later other groups of pupils' fathers and guardians had a conference, where he was invited to give his view. In each instance his advice, which was so simple, was in substance based upon the following reasoning: (1) The Constitution of the State of California, with reference to education, commands that the Legislature shall encourage by all suitable means the promotion of literary, scientific, moral, and agricultural knowledge, and that it shall keep up free schools at least six months in every year.<sup>10</sup> In pursuance of the Constitution, the Legislature enacted the statute which in substance declares that the Board of Education of San Francisco shall carry into effect the free school system and compel attendance at school. The statute, in Section 1662, which section played a very important part in the later question, further provides as follows: "Trustees (of the San Francisco School Board) shall have the power to exclude children of filthy or vicious habits and children suffering from contagious and infectious disease, and also to establish separate schools for Indian children and for children of Mongolian or Chinese descent. When such separate schools are established, Indian, Chinese, or Mongolian children must not be admitted into any other school." Upon this authority

<sup>10</sup>Const. Cal. Art. 9, Secs. 1, 5, 6.



the School Board passed the resolution we have before noted. The question before us is simple: Is a Japanese pupil filthy or vicious, or suffering from contagious or infectious disease? Is a Japanese of Indian, Chinese, or Mongolian descent?

(2) The treaty between Japan and the United States, which was proclaimed on March 21, 1895, and went into operation on July 17, 1899, is the American law, pure and simple. The President and the Senate, to be sure, are empowered to make treaties with foreign countries, and the President to execute them. But the moment this treaty went into force it became, under the Constitution, the supreme law, on an equal footing with an act of Congress, and the judges of every State were bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding. At the same moment another Constitutional provision came into full sway, namely: "The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and *treaties* made, or which shall be made, under their authority." And what does that law which is commonly named treaty provide in order that this judicial power shall extend to and protect the persons under it? It provides that the Japanese subjects in the United States shall have full liberty to reside in any part of the territories of the United States, and in whatever relates to the rights of residence there shall enjoy the same privileges, liberties, and rights as the citizens of this country or the subjects and citizens of the most favored nation. The second question before us, therefore, was also simple. In separating the Japanese children in their attendance at free schools from the children of the citizens of this country, or from the children of the citizens or subjects of the most favored nation, does the act of the San Francisco School Board deprive the Japanese of residential rights?



(3) One of the greatest celebrations in all the history of Great Japan was the celebration when the revised treaty went into operation on the 17th of July, 1899. The Japanese residents abroad reciprocated and participated in the celebration of this memorable day. The spirit of it all may be explained by the following: Theretofore in Japan all the controversies between individual Japanese and foreigners, all the controversies arising under the Japanese national or local legislation with the foreigners, had been subjected to foreign interference, either by way of consular jurisdiction or diplomatic protest. But from that day on any and everything that pertained to the rights and privileges of foreigners, in either civil or criminal cases, controversies between foreigners, between the Japanese and foreigners, or between the Japanese national or local regulations and the foreigners in Japan, has been independent of foreign interference, suggestion, or complaint; in other words, the Japanese have enjoyed constitutional autonomy. To realize this, Japan in her treaties, especially in that made between herself and the United States, provided in the words which follow:

"They shall have free access to the courts of justice in pursuit and defense of their rights; they shall be at liberty equally with native citizens or subjects to choose and employ lawyers, advocates, and representatives to pursue and defend their rights before such courts, and in all other matters connected with the administration of justice they shall enjoy all the rights and privileges enjoyed by native citizens or subjects."<sup>11</sup>

The third question before us is also simple. Is it not an American Constitutional and not an international question—that of deciding or disposing of the controversies between Japanese residents and American citizens, or between foreigners and the regulations of local government, when any question

<sup>11</sup>Art. 1, Treaty between Japan and the United States, 1894.

arises with reference to the rights or privileges of the Japanese in the United States?

(4) Lastly, let all the world understand that the Japanese are a proud people, ever positive and sensitive of their national honor; that they could not tolerate any imputation of inferiority that classes them below the citizens of this country, or the citizens or subjects of the first power of the civilized world. They have had their country of Japan over twenty-five centuries. Japanese are neither Chinese, Korean, nor Indian. They are of Japanese, and not of Mongolian race or Mongolian descent. They are the same people who successfully repelled the last Mongolian invasions which devastated Europe in the Middle Ages. By sinking over one hundred thousand Mongolian warriors in the Sea of Japan in the fourth year of Ko-an, or 1280 A.D., during the reign of Emperor Kameyama, the Japanese saved Europe from final devastation and destruction before they even knew who had saved them. One of the popular war-songs of Japan to-day, which often inspires the Japanese fighters to venture into the very jaws of death, is "Shihiaku-yoshuo Kozori," etc., which is a recital of their final victory over the barbarous Mongolians in their invasion of Japan in the Middle Ages. Japanese call races other than themselves "Ketojin," or Mongolians. Survivors of the older generations of the Japanese still indulge in this imputation. When the Americans first appeared in Japan the Japanese used to call them "Ketojin"; and they had then, and perhaps even at the present time have a hard time to convince the Japanese that they are not "Ketojin," or Mongolian. Japanese loyalty to their country stands second to none. They have demonstrated this in wars with China and later in their war with Russia. Now they have a reciprocal treaty with every civilized power upon as equal a footing as Great Britain has with the United States. At the same

time, they know and must know that the greatness and respectability of Great Japan herself is founded upon the greatness and respectability of the individual Japanese citizen. In other words, an individual Japanese, by nature and substance, cannot be called great and respectable simply because his nation is great and respectable. They know and must know that when he leaves that great country of Japan and lands in this country he must meet the American citizen or the citizens or subjects of other first-class nations. He must here prove the very greatness of Japanese individuality to the people of the civilized universe, that he can speak the English language better than the others, that he is more law-abiding than the others, more enlightened in idea and his conception of things American than the others, and that he is educationally, intellectually, morally, and industriously much stronger than the others, in order to secure and command respect among those in whose community he establishes his presence. Until then the greatness and respectability of the individual Japanese is a mockery; until then he must suffer the consequences of his own weakness and shortcomings. To attempt to disguise his defeat in his struggle as man and man under the name of his brave brothers and innocent sisters, and, moreover, by the name of his great government at home, is wicked beyond conception. More than that, it is wicked in this, that such attempt may hold up the greatest nation in Asia to the ridicule and disdain of the whole world. The fifth question, which squarely presents itself before us, is likewise simple: Is this not a question for the Japanese residents to fight out under the peaceful reign of law, and a question in which to prove their strength until their last drop of blood is gone, in the meantime being jealous of any and all interferences from their Government, and determined rather to com-

mit hari-kari than to cry for help from their brothers and sisters at home?

Our view, therefore, is different from all the accepted views. The author had started a case on a small scale, having only one associate when he filed a petition for a writ of injunction against the principals of the school and members of the San Francisco School Board in behalf of the Japanese pupil, I. Yasubara. The petition was filed in the United States Circuit Court at San Francisco, before United States Judge Wolverton, of the District of Oregon, who was then presiding over the court in the California district during the illness of Judge W. W. Morrow. But the question soon evolved into an international mountain out of an earthquake-stricken, desert hill. The author, too, was soon compelled to extend his plans. Fortunately, he secured, among his friends, six prominent lawyers, publicists, and professors as his associates. He had to prove in the end that the question really was a Constitutional question. This, our contention, however, was torn to atoms by the resulting great international volcanic eruption. And in this conflagration, our views, based upon the great principles that law is law and that it is a step to the realization of human advancement under the exposition of the highest court of the land—which principles have crowned the victories of our modern age and its progress—were all lost in the confusion.<sup>12</sup>

<sup>12</sup>When the Japanese Ambassador, Aoki, and Consul, Uyeno, entered an international protest, the Japanese colonies in San Francisco became more elevated with their own importance and ever depended upon the Empire across the ocean. The thirty-seven leaders of the colonies met, by invitation of the Japanese Consul, in the latter's residence. There they organized a "Society of the School Question." The Executive Committee met later and passed the resolution: 1. That Yasubara's injunction proceeding should be dismissed; 2. That the society tender its grateful appreciation to the author for his efforts in instituting the case; 3. That the society appoint the author as attorney for taking steps for dismissing the case now pending in the U. S.

Notwithstanding the suddenly inflated feelings of the Japanese residents by reason of their Government's help, the famous school question is now a thing of the past, forgotten in the excitement of the following war-cry. When we witness the present peaceful international situation, it is certainly the wonder of the time and a great achievement of the diplomats of the two nations who conducted the delicate affairs. Those who love peace may evermore feel indebted and grateful to the officials who conduct the foreign affairs of both Japan and the United States.

Let us now come back to our main study. We are now about to enter into a discussion of many decisions on treaties, yet in a field somewhat different than where we were before. We are aware of the principle propounded by the Supreme Court, which is an evidence of the paramount obligation of a treaty, that the statutes of limitation could not operate upon

Circuit Court; 4. That the society shall pay to the author any and every expense pertaining to the Yasubara case; 5. That the Consul shall inform the society of all the inner diplomatic movements; 6. That the society shall ask the Consul to inform the Ambassador and Secretary Metcalf that the author would withdraw the legal proceedings. The author, although on the committee, protested that the resolution could not bind him in regard to his official duty as attorney of the court, and stated that his professional friends were then preparing an amended petition. The author believed and so advised the Japanese that their success would be furthered and the attitude of the American public toward them improved if they invoked the American court's protection, rather than that of the Japanese Government, and that should the Japanese not cease troubling their government and recognize the court as Congress and the President do, they will array all their American friends against themselves and write an exclusion law with their own hands. Remembering always that a burning passion of Americans is to love and respect Japan and the Japanese, the Japanese should think and act as the Americans do. It is inadvisable to keep establishing Japanese institutions within the republican form of government by an Oriental wall of exclusion. To be able to respect and assimilate American institutions is a license of admission for Japanese to come, stay and prosper.



debts contracted before the date of the treaty of peace.<sup>13</sup> There is also the decision that the district courts of the United States, sitting as prize courts, could carry into effect, in cases of capture, even the sentence of the old Continental Court of Appeals.<sup>14</sup>

The war with Spain was concluded with the ratification of the treaty on April 11, 1899, but the insurrection of the Philipines did not end for some time. The service of a military officer during this insurrection—in other words, after the treaty of peace was proclaimed—is still considered as a service of war. When the question was brought before the judiciary, the United States Court of Claims, among other things, said: “While the question is not free from doubt because of the absence of war, technically or in an international sense,” the condition of the Filipino insurrection has been such that the service rendered therein has been considered as “rendered in time of war.”<sup>15</sup> During this time a private company was organized under the law which was claimed to be in force in the Archipelagoes after the treaty of peace. The United States authorities took possession of and occupied certain buildings of the said company. The question as to the true ownership was discussed, and the Court of Claims held the same as it was held nearly a century ago, that “the municipal laws promulgated during the time the ceding authority existed, and which are generally recognized as necessary to the peace and good order of the community, remained in full force and effect. Any other rule would hold in abeyance civil functions with respect to the use, enjoyment, and transfer of private property that would lead to results harmful to the inhabitants of the ceded territory and injurious to the best interests and authority of the new

<sup>13</sup> Cranch, 356.

<sup>14</sup> 3 Dall. 54.

<sup>15</sup> See 39 Court of Claims, Rep. 1.



sovereign as well. This is something that has not been tolerated in modern times.”<sup>16</sup>

It is an understood proposition that the military government under the authority of the United States, or by the authority of the President as Commander-in-Chief, can levy duties on imports into territory temporarily occupied as a result of war, and while insurrection is still rampant.<sup>17</sup>

In the latter case cited it is said that the occupancy of Cuba by troops of the United States was a necessary result of the war imposed upon the United States by the principles of international law, and during such occupancy the President had the undoubted right to prescribe rules and regulations having the force of law for the peaceful government of the island. It is further said that it would have been an act of bad faith and a breach of trust had the merchandise of a citizen of the United States, imported into Cuba from the United States, been exempted from the payment of such duties, and the court held that the internationally recognizable authority of the United States in Cuba, under the treaty of peace with Spain, and also under the fourth section of the joint resolution of Congress passed on April 20, 1898, was limited by the treaty “to the time of its occupation thereof,” and that the Congressional act disclaimed any disposition or intention to exercise sovereignty.<sup>18</sup> Although a state of war existed as the result of insurrection, it would not affect the validity of judicial acts which were not hostile, morally or physically, to the rightful sovereign recognized by international law.

We will now inquire as to the international status of a person born without the United States, but who alleges that he is

<sup>16</sup>39 Court of Claims, Rep. 22.

<sup>17</sup>21 Wall. 73; 2 Black, 635; 91 U. S. 9; 40 Court of Claims, Rep. 1; 40 Court of Claims, Rep. 495.

<sup>18</sup>See pp. 518-520, *Am. Jour. Inter. Law*, Apr. '07.

a descendant of an American citizen. As to this, we notice the analogy of the constructions reached in the times prior to 1808 and those successfully carried out through the times since then and prior to 1908, although much evolution in the way of statutory enactments has taken place. A person born in the colony of New Jersey before the war with Great Britain, who resided there till 1777, and who then joined the British army and always afterward claimed to be a British subject, was allowed to take lands in New Jersey by descent from a citizen of the United States.<sup>19</sup> But a person born in England before the war, who always resided there, and who never was in the United States, is an alien, and could not, in the year 1793, take lands in Maryland by descent from a citizen of the United States.<sup>20</sup> Such were the early constructions on this subject.

Now comes the case of a petitioner before the Supreme Court, as to the nature of which case we take the liberty of quoting as the court states: "The petitioner, Charles Zartarian, a subject of the Sultan of Turkey, became a naturalized citizen of the United States on September 12, 1896, before the Circuit Court of Cook County, in the State of Illinois. That his daughter Marian, on whose behalf this petition is brought, is a girl between fifteen and sixteen years of age, and was born just prior to the petitioner leaving Turkey. That in the latter part of the year 1904 the Turkish Government, at the request of the United States Minister at Constantinople, granted permission to the petitioner's wife, minor son, and his said daughter Marian to emigrate to the United States, it being stipulated in the passport issued to them that they could never return to Turkey. That on March 22, 1905, the Hon. G. V. L. Meyer, then United States Ambassador at Rome, Italy, issued a United States passport to the petitioner's said wife and daughter. That

<sup>19</sup>2 Cranch, 280.

<sup>20</sup>4 Cranch, 211.

said Marian arrived at Boston from Naples, Italy, on April 18, 1905, when she was found to have trachoma, and was debarred from landing by a board of special inquiry appointed by the United States Commissioner of Immigration for the port of Boston." The provisions of the act of March 3, 1903, entitled "An act to regulate the immigration of aliens into the United States," are to the effect that "persons afflicted with a loathsome or with a dangerous contagious disease" shall be excluded from admission to the United States. The important point which was raised by the petitioner was, that under Section 2172 of the Revised Statutes "the children of persons who have been duly naturalized under any law of the United States, . . . and being under the age of twenty-one years at the time of naturalization of their parents, shall, *if dwelling in the United States*, be considered a citizen thereof"; therefore, his said daughter, being a citizen under this statute, cannot be included in "an act to regulate the immigration of aliens into the United States."

The court, however, reminded the petitioner of the almost unbroken line of Constitutional constructions holding that a person born without the United States and not "dwelling in the United States" could not be a citizen of this country. The court further instructed the petitioner that the right of aliens to acquire citizenship is purely statutory, and that, so long as Congress does not say that an alien child who has never dwelt in this country may land when afflicted with a dangerous contagious disease, the court would not make a new law in order to allow the young Turkish girl to land. Moreover, the authorized officials of the United States having barred her entrance to the United States, it is final.<sup>21</sup>

The provision, "dwelling in the United States," has stood

<sup>21</sup>142 U. S. 651; 32 Stat. 1213.

the test of time, in the statutory day of the present as in the early period of the national life.

It may appear strange that an American citizen could not claim his own child in his own country. But the limitation to children "dwelling in the United States," from the international point of view, is not strange, but reasonable, on account of the maintenance of the principle that citizenship cannot be conferred on the citizen of another country while under the foreign jurisdiction, and also of the principle of the common law of nations which permits a sovereignty to claim the citizenship of those born within its territory. Of course, there are many exceptions to this general rule, very plain ones, too, such as where the parents of children are in the service of the United States as diplomats, or in the propagation of faith in the American God. There may be some doubt as to the latter, but we assert boldly that by reason it should not be otherwise. For one of the great American jurists, patriots and statesmen, a Supreme Court justice, whose service to the people of the United States needs no special tribute here, was born dwelling without the United States while his parents were engaged in the dissemination of the American religion.<sup>22</sup>

The international position of an American citizen under the extra-territorial rights of the United States in non-Christian countries next claims our attention. A foreign power cannot rightfully erect any court of judicature within the United States unless by force of treaty.<sup>23</sup> In the same way the American judicial power is limited in foreign countries. The extra-territorial judicial power of the United States over American citizens and their properties in foreign countries is, therefore,

<sup>22</sup>Mr. Justice Brewer was born on June 30, 1837, in a city of Asia Minor.

<sup>23</sup> Dall. 6; 10 Wheat. 66.

dependent upon the express provisions of the treaties entered into by the parties.<sup>24</sup>

By the stipulation of treaties, the American citizens in Turkey, China, Egypt, Siam, Madagascar, and other countries are subject to the jurisdiction of the consular tribunals or other judicial officers of their own country. The theory of it has been well expressed by one of the Attorneys-General of this country when he said that the extra-territoriality of foreign consuls in Turkey and other Mohammedan countries is entirely independent of the fact of diplomatic representation, and is maintained because of the difference of law and religion, being but incidental to the established fact of the extra-territoriality of Christians in all countries not Christian.<sup>25</sup> Japan, ever since July, 1899, when the revised treaty went into operation, has been admitted into reciprocal relations, and all foreign extra-territorial rights formerly exercised within the country have been withdrawn. Japan not being in the list of so-called Christian countries, yet holding a national status on an equal footing with those who claim to be such, this theory of Christendom may be said to have been somewhat shaken. Is it not, therefore, reasonable to say that the extra-territorial judicial power of one nation in another is co-terminous and co-extensive with the degree of appreciation of Christian civilization that the latter manifests compared to the tribunals of Christian nations?

While Japan's legal autonomy was, in so far as the foreign residents were concerned, subjected to the judicial powers of the respective foreign nations, there occurred a case which, tried by the American tribunals in Japan, may, from the American Constitutional point of view, be of interest for our consideration. One John M. Ross, who claimed to be a British subject,

<sup>24</sup>91 U. S. 13.

<sup>25</sup>VII Op. Atty-Gen. p. 342.



but was duly enlisted in the crew of the American steamship *Bullion* while the ship was at anchorage in the waters of Yokohama, on the 9th day of May, 1880, assaulted and killed a second mate, Robert Kelly, on the deck of the said ship. The case was tried and Ross was duly convicted in Yokohama and afterwards removed to New York, where he was confined in the Albany prison for life. Nearly ten years afterward, on the 19th of March, 1890, the convict applied to the Circuit Court of the United States for a writ of habeas corpus for his discharge, and upon the denial of the writ the case was brought to the highest court of the United States.

The petitioner contended, in the first place, that the Constitution affords a guaranty against accusation for capital or infamous crimes except on indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused. In the second place, the prisoner insisted that Congress had provided for the punishment of murder by the admiralty and maritime courts of the United States, and had provided that the trial of all offenses committed upon the high seas out of the jurisdiction of any particular State shall be in the district where the offender is found, or into which he is first brought.

However, the Supreme Court was of opinion, as to the first contention, that the Constitution had no operation in another country. When, therefore, the representatives or officers of our Government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. And, besides, their enforcement abroad in numerous places where it would be highly important to have consuls invested with judicial authority would be impracticable from the impossibility of obtaining a competent grand or petit



jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecutions. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries if commercial intercourse was to be had with their people, never could have supposed that all the guaranties in the administration of the law in reference to criminals at home were to be transferred to such consular establishments and there applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. "While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guaranties of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer in being withdrawn from the procedure of the foreign tribunals, which are often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture."<sup>28</sup> As to the second contention, the Supreme Court held that the jurisdiction to try offenses committed on the high seas in the district where the offender may be found, or into which he may be brought, is not exclusive of the jurisdiction of the consular tribunal to try a similar offense when committed in a port of a foreign country in which that tribunal is established, and when the offender is not taken to the United States. There is no law of Congress compelling the master of a vessel to carry or transport him to any home port, when he can be turned over to a consular court

<sup>28</sup>138 U. S. 157, 181; Letter of Mr. Cushing to Mr. Calhoun of Sept. 29, 1844; Letter on judicial extra-territorial rights by Sec. Frelinghuysen to chairman of Senate Committee on Foreign Relations of Apr. 29, 1882, Senate Doc. 89, 47th Cong., 1st Sess.; Phillimore on Int. Law, Vol. 2, Part 7; Hallock on Int. L., C. 41.

having jurisdiction of similar offenses committed in the foreign country. Neither the treaty nor the Revised Statutes which carry them into effect contain any such limitation. The latter speak of offenses committed in the country of Japan—meaning within the territorial jurisdiction of that country—which includes its ports and navigable waters as well as its lands. The question with reference to the fact that the prisoner was a British subject, the court, of course, dismissed in a few words by saying that the national character of the petitioner, for all the purposes of the consular jurisdiction, was determinable by his enlistment as one of the crew of the American ship *Bullion*. The concluding part of the court's opinion was such that the people of Japan would well remember it. The language of the court was: "It is true that the occasion for consular tribunals in Japan may hereafter be less than at present, as every year that country progresses in civilization and in its assimilation of the system of judicial procedure of Christian countries, as well as in the improvement of its penal statutes."<sup>29</sup>

As to the matter of the domicile of an American citizen in non-Christian countries, which includes questions of personal property or matters pertaining to the probate of wills, Judge Wilfley, of the United States Court for China, very recently rendered a very important decision. The facts of the case were that one Dr. Young J. Allen, who was born in the State of Georgia, moved to China, where he lived continuously for a period of forty-seven years and died in Shanghai on May 30, 1907. "Here his estate, consisting solely of personal property, was accumulated, and it was his oft-expressed intention to make China his permanent home." In considering the subject the court said: "Can an American citizen acquire what may be termed an extra-territorial domicile in China? Can he have

<sup>29</sup>140 U. S. 453.

a domicile out of the United States in which he is, nevertheless, governed by the laws of the United States, or must he retain that of the State in which he was domiciled before settling in China?" The court finally held that there is nothing in the theory or practical operation of the law of extra-territoriality inconsistent with or repugnant to the application of the American law of domicile to American citizens residing in countries with which the United States has treaties of extra-territoriality. Further, that Dr. Young J. Allen, having lived in China for a period of forty-seven years and having acquired an extra-territorial domicile in China, the court in the administration of his estate will consequently be guided by the law which Congress has extended to Americans in China, "which is the common law."<sup>30</sup>

The surrender by one sovereign state or nation to another, on its demand, of persons charged with the commission of crime within its jurisdiction, or, in other words, extradition, as the Americans understand it in their Constitutional construction, may be an appropriate subject to here briefly look into. Much has been written to the effect that it is incumbent upon every nation to refuse asylum to, and, upon proper application, to deliver up, all persons charged with crimes, independent of treaty stipulations. On the other hand, there is another set of writers who maintain the theory that extradition is a matter of comity, and that refusal to surrender such fugitives affords no ground for offense.<sup>31</sup>

<sup>30</sup>The decision was rendered in Shanghai, August 16, 1907. The United States Court for China was created by an act of Congress on June 30, 1906, which act vested it substantially with the jurisdiction formerly exercised by the Consular courts.

<sup>31</sup>Among the former writers are Grotius, Heineccius, Burlamaqui, Vattel, Rutherford, Schmelzing, Kent and others; and in the latter class we find Pufendorf, Voet, Martens, Kluber, Leyser, Kluit, Saalfeld, Schmatz, Mittermaier, Heffter, Wheaton and others.

The United States, with a few exceptions, has entertained neither view, but simply holds that it will not make any extradition unless there are express stipulations to that effect. This position may be due to the peculiar system of the American Government. There is no country where the representative branch of government is so firmly established as in this country, in that it constitutes an efficient check upon the executive branch of the Government. Here the least restrictions upon personal liberty are not readily tolerated. It is not like some European countries where the spirit of the Roman law yet prevails in full effect, which law presumes that the law of the nation can follow its subject wherever he may go, and may control and regulate his actions and conduct to the same extent as at home. The American practice is that even the President, the executive head of the country, is not deemed authorized to order the delivery of fugitives from justice in the absence of any express provision by treaty, or unless authorized by the statutes of Congress.

The question whether a fugitive be extraditable is a question entirely within the Federal authority and not within that of the State governments. And a State Governor, even though there was a stipulation with the country from which he fled, cannot deliver up the prisoner, and such action is held "repugnant to the Constitution."<sup>32</sup> It is also unconstitutional for the Governor to attempt to surrender a German fugitive after the President has refused to do so.<sup>33</sup>

<sup>32</sup>14 Pet. 540.

<sup>33</sup>50 N. Y. R. 321; see also Robins case, Wheaton's State Trials, pp. 392-456. It is said that Japan surrendered one Calvin Pratt in 1885 through comity, as did the United States in delivering one Koyama to Japan. As to the former we can say that it was absolutely through an executive order, but as to the latter, the United States Court investigated according to the Congressional statutes and the terms of the treaty. If we are not mistaken, the charge against Koyama as for-

As to how to arrest and detain a fugitive sought by a foreign country who is found in one of the States in this country, it is a well-understood thing that the officials shall take the accused before the nearest judicial officer who is authorized to hear and consider the evidence as to whether the prisoner is extraditable. Therefore, a marshal who found a British fugitive in Indiana, and avowed that he would carry the man directly before the United States judicial officer in New York, where a warrant would be issued, was not right. And in an application for habeas corpus the United States judges in Indiana discharged the accused, which action of the Indiana court was upheld by the Supreme Court of the United States. In rendering its opinion, the Supreme Court said that the construction of the court below was constitutional and that the marshal had no authority to take the prisoner at once from the State in which he was found and deliver him in New York.<sup>34</sup> And it has also been declared by the court that the officials, Federal or State, who were authorized to keep in custody a convict surrendered from a foreign country could not constitutionally detain him unless the accused was properly tried and convicted on the same charge for which the foreign country had delivered him up. The opinion of the Supreme Court speaks for itself in this respect: "It does not appear that any movement has been made or notice given by this Government to try the respondent on

warded in Japanese by the Japanese Minister of Justice, we found on reading to be that of obtaining money under false pretences. The treaty enumerated among other things embezzlement, but not the crime charged; this country therefore contended that the accused might be discharged by habeas corpus. But the court found that the contention could not constitutionally stand—splendid judges presided, too; so that any Japanese who would say that the United States surrendered the accused from comity, would speak as truly if he said that we did not defend a defenceless fugitive pursued by a powerful monarch.

<sup>34</sup>194 U. S. Rep. Ed. 205; 14 How. 103; Wharton, State Trials, 392; see Sundry Civil Act, Aug. 18, 1894.

the indictment for the crime for which he has been extradited, but his imprisonment in Sing Sing prison is upon a conviction of a crime for which the Canadian court had refused to extradite him, and is entirely different from one for which he was extradited. In other words, he has been extradited for one offense, and is now imprisoned for another which the Canadian court held was not, within the treaty, an extraditable offense. Whether the crime came within the provisions of the treaty was a matter for the decision of the Dominion authorities.”<sup>85</sup>

<sup>85</sup>205 U. S. 309; 198 U. S. 1-17.



## CHAPTER XXI

### FOREIGN REPRESENTATIVES

THE closeness of the international relations of the age and the enormous increase of reciprocal interests between one country and another attract special attention to matters relating to foreign representatives.

Ever since the first Congress opened, the legislative records show the intention to open and keep open the highest court of the nation, in the first instance, for suits involving diplomatic or commercial representatives of a foreign government. In the first Congress, of which many members had been leading and influential members of the Convention which framed the Constitution, it was not understood that the original jurisdiction vested in the Supreme Court was necessarily exclusive of the jurisdiction of the inferior Federal courts. So much respect was due to the rank and dignity of foreign representatives that the statutory provision did not then, and does not now, deprive an ambassador or public minister of the privilege of suing in any Federal court he may choose. Were it otherwise, in many cases it would convert what was intended as a favor into a burden.

No elaboration is needed of the fact that the person of an ambassador or public minister carries with it an extra-territoriality. When this is recognized, it needs no argument to prove that he is absolutely exempt from responsibility to the laws of the country to which he is sent. The inviolability at-

taching to the person of an ambassador or public minister must be understood to mean that his integrity, intelligence, and personality are such that the common law of nations bestows this extraordinary prerogative. We hope that it is not the case merely because he is the representative of a sovereign state or sovereign. We wish to know whether his rights and prerogatives should be construed as an acknowledgment that he does not commit wrongful acts in the State in which he is located, or whether they exist merely because of the international ordinance that his dwelling and even his footsteps mark inviolability and extra-territoriality.

In the event of an ambassador or public minister committing a wrongful act, he may be restrained, if need be, by force. And in the exercise by another of the right of self-defense he may be wounded or, if necessary, killed by any one whom he has assaulted, and the Government of the United States is under no responsibility to the nation from which he has been sent and has given no cause of complaint to the Government which employs him. There are instances in the history of international law of an ambassador or public minister acting with so little regard for his high duty and so abusing his privileges as to insult or openly attack the laws of the nation to which he is sent. In such a case his functions may be suspended by a refusal to treat with him, or application may be made to his own sovereign for his recall, or he may be ordered to depart within a specified time. In 1749 the French Minister, Genet, was recalled by reason of his alleged attempt to stir up the American people against the President. The recall of the Spanish Minister, Yrujo, in 1807, was demanded because of his alleged bribery of a certain Philadelphia paper to advocate the Spanish view of the boundary question then in controversy with the United States. In 1809, for charging the American Secretary

of State with having acted with falsehood and duplicity, the British Minister, Jackson, was recalled. Lord Sackville, a British Minister, was recalled in 1888 on the charge of alleged interference in the internal affairs of this country. In regard to this case certain publicists of this country and abroad explained that he was the victim of a plot. Catacazy, a Russian Minister, was also asked to leave this country on the ground of his disagreeableness both in doing business and in social intercourse.<sup>1</sup>

The dwelling-house or official mansion of an ambassador or public minister does not hold immunity for a fugitive against whom a charge is brought by a court of law. Should a minister allow such offender to live in his dwelling or official mansion, the offender can be demanded by the authority, and if denied, the police have the right to force surrender.<sup>2</sup>

If the alleged act of an ambassador or public minister is one of great gravity, like that of Mr. Bulwer, British Minister to Spain in 1845, he may be given his passports, with an intimation that he should quit the country within forty-eight hours.<sup>3</sup> In case of a still graver charge he may be arrested and kept in custody. Count Gyllenborg, the Swedish Ambassador to England, was arrested and kept in custody for a time for conspiracy in a plot against the Hanoverian dynasty. The Prince of Cellamere, the Spanish Ambassador to France, was arrested and detained in custody in Paris for his alleged organ-

<sup>1</sup>Mr. Fish, Sec. of State to Mr. Curtin, Aug. 18, 1871.

<sup>2</sup>However, such an asylum to persons charged with political offences, to a certain extent exists in some states, such as those of Central and South America, West Indies and China. The U. S. Government suggested in 1870 that the great powers should combine to discourage such a practice, but was not altogether successful.

<sup>3</sup>In 1848, Bulwer was charged with interfering in the internal affairs of Spain.

ization of a conspiracy against the Government of the Duke of Orléans in 1718.

The exemption which an ambassador or public minister enjoys extends also to his family, to the secretaries and other attachés and employees of the legation or embassy and to his diplomatic servants. As to the precise extent of this immunity in the case of servants, it may be said that arresting them or in any way interfering with their labor would interfere with the work of their employer, although it is understood that the servant has no immunity or privileges except through his employer.

There are certain kinds of attachés whose duties are to obtain military information in the State in which they reside. They are commonly called military or naval attachés. A peculiar feature of their office is, that while they enjoy immunities and privileges on a similar footing with the other attachés of the legation or embassy, still they transact their business, sometimes through their nation's diplomatic agent, but often directly with the military department of the state from which they were sent. There is occasionally, as a necessary incident to their duties of obtaining military information, considerable friction between the state which sends them and the state to which they are attached over the contents of their reports. Such friction has often culminated in their recall.

Within the meaning of the act of Congress, attachés are on an equal footing with the public minister. Their personal or household goods are exempt from legal attachment, seizure, or molestation. Suppose a foreign attaché happened to board in a hotel in Washington, and some disagreement occurred between the attaché and the hotel-keeper; until the Secretary of State interferes, the hotel-keeper cannot remove any of the attaché's

personal effects.<sup>4</sup> But if a citizen of America, or even a countryman of such an attaché, who, however, is totally unconnected in any capacity with the diplomatic service, happens to stop in said hotel, and commits there an unlawful act, such as murder—although the hotel wherein the attaché resides is by legal fiction inviolable territory and his own national law has jurisdiction thereover—yet it cannot be demanded that the criminal be sent to the country of such attaché. For injuries done by private persons to an ambassador, minister, attaché, or even their servant, or for damage to their respective personal effects, the Government of the United States affords redress through its courts. And the laws of the United States which punish those who violate the privileges of a foreign representative are obligatory equally on the State courts and upon those of the United States.<sup>5</sup>

No inviolability attaches to the person of a consul. The duties of consuls are to watch over the commercial interests of their country, to see to the execution of the commercial treaties, the subject-matter of which necessarily falls within the jurisdiction of consuls, and to assist and advise such of their countrymen as may be residing within their jurisdiction. By consular conventions held among the several nations the right of a consul has become recognized to make application to the local authority for the protection of his fellow-countrymen, and in case of any infraction of a commercial treaty he may address himself to the Government itself whenever his country's duly authorized diplomatic agents are absent.<sup>6</sup>

Prior to the establishment of the permanent mission of the public minister in Europe in the seventeenth century the consul

<sup>4</sup>1 Stat. 118; R. S. Sec. 4062.

<sup>5</sup>Mitchenoff's case, England, 1867; V Opin. Atty-Gen. p. 69; 4 McLean, 29; 2 Wash. 205; 11 Wheat. 467.

<sup>6</sup>See the British Consul's Guide; 211 Opin. Atty-Gen. p. 342.

enjoyed about the same immunities as are enjoyed by the ambassador or minister of the present day. But since that period consuls have been gradually brought down to a position almost equal to that of any foreign resident, although we recognize that certain ill-defined respects and privileges, necessary ingredients in the execution of their consular duties, are attached to them. The consuls, in the common understanding, include consul-general, consul, vice-consul, acting consul, or consular agent. When they are appointed by their home government, they are provided with a commission, or letters of appointment to be submitted to the government in which they are to perform consular duties. If that government recognizes them as consuls, an *exequatur* or confirmation of this commission is issued by it. For misconduct or crime, or for overstepping their proper jurisdiction, this *exequatur* may be revoked. The French consul at Boston, in 1793, was deprived of his *exequatur* for having taken part in an attempt to rescue a vessel out of the hands of the United States marshal. The *exequatur* of the British consul at Charleston, Mr. Bunch, was also revoked in 1861 for violating the act of Congress that no person not authorized by the President should assist in any political correspondence with the government of a foreign state in relation to any dispute with the United States, and the British Government did not dispute the right of the United States to withdraw the *exequatur* of Consul Bunch. In 1869, Haggerty, American consul to England, was refused his *exequatur* on the ground that he had previously participated in Fenian plots. Three British consuls were deprived of their *exequaturs* by the American Government for an attempt to recruit men for the British army during the Crimean war. And in 1866 the consul for Oldenburg at New York was deprived of his *exequatur* because he did not obey an order of the Supreme Court of the United



States. As soon as the *exequatur* is revoked, so soon does a man lose his official character as consul.

It now becomes necessary to go into detail and to show what courts have jurisdiction over the cases in which a consul is one or the other of the parties. The Judicial Act of 1789 invested the district courts of the United States with "jurisdiction, exclusively of the courts of the several States, of all suits against consuls or vice-consuls," except for offenses of a certain character; the Supreme Court was given "original, but not exclusive, jurisdiction of all suits in which a consul or vice-consul shall be party," and the circuit courts were vested with "jurisdiction of civil suits in which an alien is a party." In this act we have an affirmation by the first Congress—many of whose members participated in the Convention which adopted the Constitution, and were, therefore, conversant with the purposes of its framers—of the principle that the original jurisdiction of the Supreme Court of cases in which a consul or vice-consul is a party is not necessarily exclusive, and that the subordinate courts of the Union may be invested with jurisdiction of cases affecting such representatives of foreign governments.

Early after the passage of that act, the case of the United States against Ravara was tried in the Circuit Court of the United States for the District of Pennsylvania, before Justices Wilson and Iredell, of the Supreme Court, and the District Court Judge. This case was an indictment against a consul for a misdemeanor, of which it was claimed the Circuit Court had jurisdiction under the eleventh section of the Judiciary Act, which gave the Circuit Court "exclusive cognizance of all crimes and offenses cognizable under the authority of the United States," except where that act "otherwise provides, or the laws of the United States shall otherwise direct," and concurrent jurisdiction with the District Court of the crimes and

offenses cognizable therein. In behalf of the accused it was contended that the Supreme Court, by virtue of the Constitutional grant to it of original jurisdiction in all cases affecting ambassadors, other public ministers and consuls, had exclusive jurisdiction of the prosecution against him. Mr. Justice Wilson and the District Judge concurred in overruling this objection. They were of opinion that, although the Constitution invested the Supreme Court with original jurisdiction in cases affecting consuls, it was competent for Congress to confer concurrent jurisdiction in those cases upon such inferior courts as might by law be established. The indictment was sustained, and the defendant upon the final trial, at which Chief Justice Jay presided, was found guilty. He was subsequently pardoned on condition that he would surrender his commission and *exequatur*.<sup>7</sup>

The case of Ortega was a criminal prosecution in the Circuit Court of the United States for the offense of offering personal violence to a public minister, contrary to the law of nations and the act of Congress. One of the questions certified for decision was whether the jurisdiction conferred by the Constitution upon the Supreme Court, in cases affecting ambassadors or other public ministers and consuls, was not only original but exclusive of that of the circuit courts. But decision of this point was waived and the case determined upon another ground.<sup>8</sup> Of that case it was remarked by Chief Justice Taney that an expression of opinion upon that question would not have been waived had the court regarded it as settled by previous decisions. Along the same line, in a case that in later times was presented before the Supreme Court, it was held that it could hardly have been the intention of the statesmen who framed our Constitution to require that one of our citizens

<sup>7</sup>2 Dall. 297.

<sup>8</sup>11 Wheat. 467.

who had a petty claim of even less than five dollars against another citizen who had been clothed by some foreign government with the consular office should be compelled to go into the Supreme Court to have a jury summoned in order to enable him to recover it; nor could it have been intended that the time of that court, with all its high duties to perform, should be taken up with the trial of every petty offense that might be committed by a consul in any part of the United States—that consul, too, being often one of our own citizens.

Such was the state of the law when the Revised Statutes later went into operation. By Section 563 of the Revised Statutes it was provided that the “district courts shall have jurisdiction of all suits against consuls and vice-consuls,” except for certain offenses; by Section 629, that “the circuit court shall have original jurisdiction” of certain classes of cases, among which are civil suits in which an alien is a party; and by Section 711, that the jurisdiction vested in the courts of the United States in the cases and proceedings there mentioned—among which are “suits against ambassadors or other public ministers or their domestic servants, or against consuls or vice-consuls”—shall be exclusive of the courts of the several States. But by the act of February 18, 1875, that part of Section 711 last quoted was repealed; so that under the existing law there is no statutory provision which, in express terms, makes the jurisdiction of the courts of the United States exclusive of the State courts in suits against consuls or vice-consuls.<sup>9</sup> But it has been held that when a consul, ambassador, or public minister appears in an American court, Federal or State, or takes part in the proceedings thereof, he shall be required to be governed by the rules and orders of such court, notwithstanding his official privileges.

<sup>9</sup> 9 La. Ann. 96; 191 Mass. 276; 3 Pet. 242.

## CHAPTER XXII

### ADMIRALTY

THE judicial power of the United States, according to the Constitution, extends "to all cases of admiralty and maritime jurisdiction." In understanding their specific grant of power, however, we must confine ourselves solely to the jurisdiction over which the power of the courts extends. Otherwise we will be tempted to stray into the wilderness of the old Mediterranean world, where we might spend our time in endless wandering. In the Roman jurisprudence over twenty centuries ago there was a system of admiralty and maritime law, part of which, even at the present day, might be applied in America without much modification. Nor will we ponder long over the law of nations, in which the reason of admiralty law is found, and which, in great measure, controls the American system.

But we need to say at the outset that it was the same want of international society that impelled the Roman jurists, and the Europeans who followed them in later days, which impelled the founders of the American nation to vest admiralty and maritime jurisdiction exclusively in the national court, instead of in the State courts. "I beg of you, my dear sir," George Washington wrote to Richard Henry Lee in colonial days, "to use your influence in having a court of admiralty or some power appointed to hear and determine all matters relative to captures. You cannot conceive how I am played

on the head, and how impossible it is for me to hear and determine upon matters of this sort, when facts, perhaps, are only to be ascertained at points forty, fifty, or more miles from Boston, without bringing the parties here at great trouble and expense. At any rate, my time will not allow me to be a competent judge of this business."<sup>1</sup>

The jurisdiction over admiralty, in the beginnings of this country, before the adoption of the Constitution, like several other powers, was exercised by the State authority, independent of the National Government. The Pennsylvania House of Representatives, on the 3d of February, 1776, elected a Court of Admiralty. Every one of the original thirteen States had its own Court of Admiralty. Under such circumstances, one State decision contradicted another, so that it was necessary for the Continental Congress to enact a law that the United States in Congress assembled should have the sole and exclusive right of decision in all such cases. The Standing Committee of Appeals was established to hear and determine the appeals from the State Admiralty Courts. However, the fundamental weakness of the Continental Congress was always made manifest in contrast to the strong hand of the States' power. The State judge often refused to recognize the authority of the Continental Congress order, and carried out his own decision as final, and made it known that the State admiralty jurisdiction was over and above the Federal jurisdiction. Congress knew that the State idea was absurd and repugnant to the general interest of the nation as well as to the law of nations, but it could do nothing, partly through fear that it might endanger the peace of the United States, and partly through the expectation that the public sentiment would, in the future, come to the front and decide, through reason and patriotic interest, to

<sup>1</sup>Sparks, *Life and Letters of Washington*, Vol. III, p. 270.

have a powerful court of last resort established in order to give full effect to its decree. Therein lay the germ of our national judiciary. The public mind tolerated this almost intolerable condition of affairs until the will of the American people was inscribed in that greatest of charters, the Constitution of the United States.

When the Constitution was adopted by the people, the court began to remove all such intolerable conditions, and gave the people to understand, in the words of James Iredell: "In this, as in all other cases where there is a wise distribution, power is commensurate to its object. In no case but where the Union is in some measure concerned are the Federal courts to have any jurisdiction. The State judiciary will be a satellite waiting upon its proper planet; that of the Union, like the sun, cherishing and preserving a whole planetary system."<sup>2</sup>

Investiture of exclusive jurisdiction of the admiralty in the Federal courts is, therefore, the inevitable result of the national importance and the self-interest of the people. When the courts began to hear and determine cases, they were often called upon to adjudge, for final settlement, the cases tried by the weak, old Federal Court of Appeals under the Articles of Confederation. The case of *Olmstead*, for instance, which was decided in his favor by the old Standing Committee of Appeals, afterwards was quashed as illegal by the State judge, and then was ignored by the Confederation Federal judges through fear of collision with the States' power, now appeared before the District Court of the United States and was decided in *Olmstead's* favor. This court, however, on account of the delicacy of the circumstances, appealed to the Supreme Court of the United States to issue to the court below the mandamus for the enforcement of the order. Chief Justice Marshall, in

<sup>2</sup>Secret Journals of Congress, Vol. III, p. 502; 3 Dall. 278.



'ordering the execution of the order, said: "If the Legislatures of the several States may at will annul the judgment of the courts of the United States and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery, and the nation is deprived of the means of enforcing its law by the instrumentality of its own tribunals. . . . It will be readily conceived that the order which this court is enjoined to make, by the high obligation of duty and of law, is not made without extreme regret at the necessity which has induced the application. But it is a solemn duty and therefore must be performed."<sup>3</sup>

The field of the admiralty and maritime jurisdiction of the Federal Government has expanded steadily as the necessity for such expansion was brought home to the public mind. In the period of Taney's chief-justiceship it was extended to the Mississippi above tidewater and to the entire chain of the Great Lakes and the waters connected with them.<sup>4</sup>

Let us examine now for a moment some illustrative cases. In the case of the steamship *Mongolia*, which was a proceeding

<sup>3</sup>5 Cranch, 115.

<sup>4</sup>12 How. 466; 5 How. 441; 12 How. 443; 13 How. 101; 17 How. 100. Those who have not access to the reports of the Federal Courts, see James Barr Ames' Cases on Admiralty; Bancroft, U. S. Hist.; Hildreth, U. S. Hist.; Jameson, Essays U. S. Const. Hist.; Browne's Civil and Ad. Law; Charter, Wm. Penn, Secs. V, XIV; 1 Logan Papers, 200; Martin, Bench and Bar of Phila.; Carson, Hist. U. S. Sup. Court: "In 1768, in the spirit of aggression which had animated the Stamp Act, an act of Parliament was passed to establish the Courts of Vice-Admiralty in all the colonies on a new model. . . . These measures were met with angry remonstrances on the part of the colonists, which soon ripened into open opposition. . . . In the words of John Adams, when announcing the declaration of the town of Braintree: 'The most grievous innovation of all is the extension of the power of courts of admiralty, in which one judge presided alone, and, without juries, decided the law and the fact, holding his office during the pleasure of the King, and establishing that most mischievous of all customs, the taking of commissions on all condemnations.'"

in admiralty on account of a collision occurring in the Alabama River, in the State of Alabama, it was contended that the jurisdiction in admiralty did not attach, because the collision was within the body of the country, and also because it was at a point on the river above tidewater. But this contention was overruled on the ground, first, that after the adoption of the Constitution the exercise of admiralty and maritime jurisdiction over its navigable rivers, ports, and harbors was surrendered by each State to the Government of the United States, without exception as to the subjects or places, and the Supreme Court could not interpolate or introduce an arbitrary distinction into the Constitution which had no foundation in reason or precedent; therefore, the objection to the jurisdiction that the collision was within the country could have no greater force or effect from the fact that the Alabama River, so far as it was navigable, was wholly within the boundary of the State. Second, that though in England the flux and reflux of the tide was a sound and reasonable test of a navigable river, because on that island tidewater and navigable water were synonymous terms, yet there was certainly nothing in the ebb and flow of the tide to make the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide to render it unfit.<sup>5</sup> In addition to this case, we have one case, among others, perhaps most fitted to give us an understanding of admiralty and maritime jurisdiction, the case brought up by a passenger on the steamship *Moses Taylor*, running from New York to San Francisco. A contract was entered into between the passenger and the owner of the said steamship that in consideration of one hundred dollars the steamship owner would transport him as a steerage passenger with dispatch, and furnish him with proper and necessary food, water, and berth or other con-

<sup>5</sup>20 How. 296.

veniences for lodging on the voyage. For an alleged breach of the said contract, the case was brought in one of the State courts of California. The agent for the steamship *Moses Taylor* appeared in the action and denied the jurisdiction of the State court, and contended that the case properly belonged to the court of admiralty and maritime jurisdiction. The contention having been overruled by the State court, the case was reviewed by the Supreme Court of the United States on writ of error.

It was there held that the case presented was clearly one within the admiralty and maritime jurisdiction of the Federal courts. The contract for the transportation of a passenger by water is a maritime contract. It relates exclusively to a service to be performed on the high seas, and pertains solely to the business of commerce and navigation. There is no distinction in principle between a contract of this character and a contract for the transportation of merchandise. The same liability attaches upon their execution both to the owner and to the ship. The passage money in the one case is equivalent to the freight money in the other. A breach of either contract is an appropriate subject for admiralty jurisdiction. Particularly through the legislation of Congress, the cognizance of civil causes in admiralty and maritime law has been vested in the United States district courts. It has been made exclusive in them by Congress, and that is sufficient, even if we should admit that in the absence of legislation by Congress the State courts might have taken cognizance of these causes.

What occasion, then, is there left for the State to be concerned in matters relating to admiralty and maritime proceedings? In the case of a criminal proceeding started in the State of Massachusetts, to impose a fine for violation of a State statute regulating the methods of fishery in Buzzards Bay, the Supreme Court of Massachusetts held that the State statute

was constitutional, and thereupon the accused sued out a writ of error to the Supreme Court of the United States. In reviewing the case the Supreme Court was of opinion that the statute of Massachusetts which the defendant was charged with violating was in its terms confined to waters within the jurisdiction of the Commonwealth, and it was evidently passed for the preservation of the fish, and made no discrimination in favor of citizens of Massachusetts and against citizens of other States. "If there be a liberty of fishing for swimming fish in the navigable waters of the United States common to the inhabitants or the citizens of the United States, upon which we express no opinion, the statute may well be considered as an impartial and reasonable regulation of this liberty, and the subject is one which a State may well be permitted to regulate within its territory, in the absence of any regulation by the United States. The preservation of fish, even though they are not used as food for human beings, but as food for other fish which are so used, is the common benefit, and we are of the opinion that the statute is not repugnant to the Constitution and the law of the United States."

The court went on to say: "The pertinent observation may be made that as Congress does not assert by legislation a right to control pilots in bays, inlets, rivers, harbors, and ports of the United States, but leaves the regulation of the matter to the State, so if it does not assert by affirmative legislation its right or will to assume the control of such fisheries in such bays, the right to control such fisheries must remain with the State which contains such bays. While we do not consider the question whether or not Congress could have the right to control the menhaden fisheries which the State of Massachusetts assumes to exist in the State, in the absence of the affirmative action of

Congress taking such control, the fact that Congress has never assumed the control of such fisheries is persuasive evidence that the right to control them still remains."<sup>6</sup>

And so the broad current of judicial decisions flows on as smooth as the stream of American progress. Now, the judicial power of determining admiralty and maritime cases is absolutely vested in the Federal courts, and the expression of Chief Justice Jay has been sustained, when he said, in the beginning of the new Government under the Constitution: "Because the seas are the joint property of nations, whose rights and privileges relative thereto are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction."<sup>7</sup>

<sup>6</sup>139 U. S. 240; 12 How. 299.

<sup>7</sup>2 Dall. 419.

## CHAPTER XXIII

### SUITS AGAINST THE SOVEREIGNTY

IT is a fundamental principle of public law, affirmed by a long series of decisions of the Supreme Court, that no suit can be maintained against the United States without the express authority of Congress. The United States, by various acts of Congress, has consented to be sued in its own courts in certain classes of cases, but it has never consented to be sued in any case in the courts of a State. Neither the Secretary of War, nor the Attorney-General, nor any subordinate of either, has been authorized to waive the exemption of the United States from judicial process, or to submit the United States or its property to the jurisdiction of the court in a suit brought against its officers.

Chief Justice Marshall had occasion to remark concerning this exemption, that "there seems to be a necessity for admitting that the fact might be disclosed to the court by the suggestion of the attorney for the United States."<sup>1</sup>

"However," says Mr. Justice Gray, "the answer actually filed by the District Attorney, treated as undertaking to make the United States a party defendant in the cause and liable to have judgment against them, was in excess of the instructions of the Attorney-General and of any power vested by law in him or in the District Attorney, and could not constitute 'voluntary submission by the United States to the jurisdiction of the court.'"<sup>2</sup>

<sup>1</sup>7 Cranch, 116.

<sup>2</sup>162 U. S. 255.



In examining that portion of the judicial power which extends to "controversies between two or more States," it must be remembered that the judiciary is not that department of the Government to which the assertion of its rights against foreign powers is confided. If the course of the nation has been a plain one, its courts would hesitate to pronounce it erroneous. Its duty commonly is to decide upon individual rights according to those principles which the political departments of the nation have established.

If those departments which are intrusted with the foreign relations of a nation, which assert and maintain its interests against foreign powers, unequivocally assert the right of dominion over a country of which they are in possession and which they claim under a treaty, and if the Legislature of the former nation has acted on the authority thus asserted, it is not in its own courts that this authority is to be denied. A controversy between two nations, such as a question of national boundary, is, as has been truly said, more a political than a legal question, and in its decision the courts of every country are known to respect the pronounced will of the Legislature.<sup>3</sup> This principle relates to questions between independent nations, and has no application to questions of that character arising between the general Government and one of the States composing the American Union, or between two States of the Union.

At the time of the adoption of the Constitution there existed controversies between eleven States in respect to boundaries, controversies which had existed from the first settlement of the colonies. The necessity for the creation of some tribunal for the settlement of these and like controversies which might arise under the new Government must, therefore, have been perceived by the framers of the Constitution, and, consequently,

<sup>3</sup> 2 Pet. 253, 307, 319.

among the controversies to which the judicial power of the United States was extended by the Constitution we find those between two or more States. That a controversy between two or more States in respect to boundary is one to which under the Constitution such judicial power extends is no longer an open question in the Supreme Court.<sup>4</sup>

"It has, then, been settled by our predecessors, on great deliberation," said Chief Justice Marshall, "that this court may exercise its original jurisdiction in suits against a State, under the authority conferred by the Constitution and existing in acts of Congress." "It has jurisdiction of questions of boundary between two States of this Union," emphasizes Mr. Justice Miller, "and this jurisdiction is not defeated because in deciding that question it becomes necessary to examine into and construe compacts or agreements between those States, or because the decree which the court may render affects the territorial limits of the political jurisdiction and sovereignty of the States which are parties to the proceeding." The States of the Union have agreed, in the Constitution, according to Mr. Justice Harlan, in further confirmation of the above, that the judicial power of the United States shall extend to ALL cases arising under the Constitution, laws and treaties of the United States, without regard to the character of the parties (excluding, of course, suits against a State by its own citizens, or by citizens of other States, or by citizens or subjects of foreign states).<sup>5</sup>

But we must bear in mind that there are certain instances in which, as has been contradistinguished by the cases above enumerated, the Federal courts have declined their aid, although such instances were controversies between two States. To illustrate:

<sup>4</sup>12 Pet. 657; 5 Pet. 284; 7 How. 660; 17 How. 473; 23 How. 505.

<sup>5</sup>5 Pet. 284; 11 Wall. 39; 143 U. S. 628.

In the cases of Towley against Lindsey, and Fowler against Miller, actions of ejectment were pending in the Circuit Court of the United States for the District of Connecticut between private citizens for lands over which the States of Connecticut and New York both claimed jurisdiction; and a writ of *certiorari* to remove those actions into the Supreme Court as belonging exclusively to its jurisdiction was refused because the State was neither nominally nor substantially a party to them.<sup>6</sup> Afterwards, upon a bill in equity filed in the Supreme Court by the State of New York against the State of Connecticut to stay the actions of ejectment, the Supreme Court refused the injunction prayed for because the State of New York was not a party to the suits and had no such interest in their decision as would support the bill.

The Supreme Court declined also to take jurisdiction of suits between States to compel the performance of obligations which, if the States had been independent nations, could not have been enforced judicially, but only through the political departments of their governments. Thus, in the case of the State of Kentucky against Dennison, where the State of Kentucky, by her Governor, applied to the Supreme Court in the exercise of its original jurisdiction for a writ of *mandamus* to the Governor of Ohio to compel him to surrender a fugitive from justice, the Supreme Court, while holding that the case was a controversy between two States, decided that it had no authority to grant the writ.<sup>8</sup>

There has been much discussion as to the Constitutional clause, "controversy between a State and citizens of another State." Extracts from the leading cases upon this point are

<sup>6</sup>3 Dall. 411. ~

<sup>8</sup>24 How. 66; see the recent case of Collins, of California; 108 U. S. 76; 5 Pet. 1, 20, 28, 51, 73.

quoted as showing the position of the Supreme Court. A main object of vesting in the courts of the United States jurisdiction of suits by one State against the citizens of another was to enable such controversies to be determined by the national tribunals, and thereby to avoid the partiality, or suspicion of partiality, which might exist if the plaintiff State were compelled to resort to the courts of the States of which the defendants were citizens. But a well-defined principle is that the penal laws of a country do not reach beyond its own territory, except when extended by express treaty or statute to offenses committed abroad by its own citizens; and they must be administered in its own courts only and cannot be enforced by the courts of another country. In the language of Chief Justice Marshall, "The courts of no country execute the penal laws of another. The grant is of 'judicial power,' and was not intended to confer upon the courts of the United States jurisdiction of a suit or prosecution by the one State of such a nature that it could not, on the settled principles of public and international law, be entertained by the judiciary of the other State at all. The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment."<sup>9</sup>

"The only cases in which the courts of the United States have entertained suits by a foreign state," says Mr. Justice Gray, "have been to enforce demands of a strictly civil nature."

<sup>9</sup>127 U. S. 265; Wharton, *Conf. Laws*; 10 Wheat. 66, 123.

"A foreign sovereign, as well as any other person, who has a demand of a civil nature against any person here," emphasized Mr. Justice Bradley in the case of "The Sapphire," in which the French Republic was a party, "may prosecute it in our courts."<sup>10</sup>

The Supreme Court entertained jurisdiction in the case of the King of Spain against Oliver because it was a case arising out of a civil contract. Like instances are numerous, and to recite them is superfluous. It is now a well-understood principle that society takes no step when it receives no hurt, and that it is given no right to punish where there is no crime committed.

In respect to the subject-matter over which the jurisdiction of the courts of the United States is to be exercised, the Constitution mentions one word, and that word is "controversies." From the court decisions and the acts of Congress we may clearly discern that the word "controversies" cannot be presumed to include any proceedings that relate to criminal cases. According to Mr. Justice Iredell, "Chief Justice Jay, in summing up the various classes of cases to which the judicial power of the United States extends, used 'demands'—a word quite inappropriate to designate criminal or penal proceedings—as including everything that a State could prosecute against citizens of another State in a national court." "The original jurisdiction of the Supreme Court of the United States," adds Mr. Justice Gray, "is conferred by the Constitution, without limit of the amount in controversy, and Congress has never imposed—if, indeed, it could impose—any such limit." "If this Court has original jurisdiction of any case, it must follow that any action upon a judgment obtained by a State in her own courts against a citizen of another State for the recovery of any

<sup>10</sup>11 Wall. 167.



sum of money, however small, by way of a fine for any offense, however petty, against her laws, could be brought in the first instance in the Supreme Court of the United States. That cannot have been the intention of the Convention in framing, or of the people in adopting, the Federal Constitution."<sup>11</sup>

It is true that if the prosecution in the courts of one country for a violation of its municipal law is *in rem*, to obtain a forfeiture of specific property within its jurisdiction, a judgment of forfeiture rendered after due notice, and vesting the title of the property in the State, will be recognized and upheld in the courts of any country in which the title to the property is brought in issue. But the recognition of a vested title in property is quite different from the enforcement of a claim for a pecuniary penalty. In the one case, a complete title in the property has been acquired by the foreign judgment; in the other, further judicial action is sought to compel the payment by the defendant to the plaintiff of money in which the plaintiff has not as yet acquired any specific right.<sup>12</sup> In this connection, we wish to remind our readers that the Constitutional provision, "Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State,"<sup>13</sup> does not alter the application of the rules above presented. The Constitutional provision establishes a rule of evidence and not of jurisdiction. We are aware of the fact that there are certain exceptional cases, in one of which the courts of the State of Ohio entertained an action upon a judgment rendered in Connecticut for a violation of the penal laws, and in another the Massachusetts courts sustained a judgment rendered in the Pennsylvania State court on a penal statute, and again, the courts of Iowa recognized a judgment of the courts of Indiana

<sup>11</sup>2 Dall. 402-419; 127 U. S. 265.

<sup>12</sup>4 Cranch, 241; 4 Cranch, 293.

<sup>13</sup>Art. 4, Sec. 1, U. S. Const.



on a penal statute.<sup>14</sup> These decisions, however, the Supreme Court did not consider a full exposition of the law, and on several occasions used this language: "The *supposed* effect of the provisions of the Constitution and the act of Congress as to the faith and credit due to a judgment rendered in another State." Mr. Justice Bradley, speaking for the Supreme Court, upheld the words of Mr. Justice Story, saying: "The Constitution did not mean to confer any new power upon the States, but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of other States domestic judgments to all intents and purposes, but only gave a general validity, faith, and credit to them as evidence. No execution can issue upon such judgments without a new suit in the tribunals of other States. And they enjoy not the right of priority or lien which they have in the State where they are pronounced, but that only which the *lex loci* gives to them by its own laws in their character of foreign judgments."<sup>15</sup>

We are now about to investigate the controversies "between citizens of the different States," over which the courts of the United States have been given jurisdiction by the Constitution. The Supreme Court has in many cases decided that the acts of Congress provide that the circuit courts of the United States shall have original cognizance of all suits of a civil nature at common law or in equity in which there is a controversy between citizens of different States. And we see no reason for arriving at any other conclusion.

But there is this to remember. The members of the Union are the only States contemplated in the Constitution. Therefore, if there be two or more joint plaintiffs and two or more joint

<sup>14</sup>1 Ohio, 259; 11 Pick. 389; 21 Iowa, 370; 2 Dall. 402, 415; 3 Dall. 1.

<sup>15</sup>18 Wall. 457, 462, 463; 127 U. S. 265; Story, Conf. Laws.

defendants, each of the plaintiffs must be capable of suing each of the defendants in the courts of the United States in order to support the jurisdiction.<sup>16</sup> The Supreme Court, in the case of *Strawbridge against Curtiss*, said that the circuit courts of the United States have no jurisdiction on the ground of diverse citizenship, if there are two plaintiffs to the action who are citizens of and residents in different States, and the action is brought in the State in which one of the plaintiffs resides.<sup>17</sup> In a later case, Chief Justice Marshall had occasion to render his usual clear opinion, and pointed out that "Gabriel Winter, then being a citizen of the Mississippi Territory, was incapable of maintaining a suit alone in the Circuit Court of Louisiana. Is his case mended by being associated with others who are capable of suing in that court? In the case of *Strawbridge against Curtiss*, it was decided that where a joint interest is prosecuted, the jurisdiction cannot be sustained unless each individual be entitled to claim that jurisdiction. In this case it has been doubted whether the parties might elect to sue jointly or severally. However this may be, having elected to sue jointly, the court is incapable of distinguishing their case, so far as respects jurisdiction, from one in which they were compelled to unite."

The case of *Hooe against Jamieson* was a case brought in the Circuit Court of the United States for the District of Wisconsin. The plaintiffs were citizens of Washington, D. C., and the defendants were citizens of Wisconsin. Chief Justice Fuller upheld the principle we have so far brought out and said: "In *Barney against Baltimore*,<sup>18</sup> which was a bill for partition, it appeared that some of the defendants were citizens of the District of Columbia and some of them citizens of Maryland, and

<sup>16</sup>Judiciary Act of Aug. 13, 1888, 25 Stat. 433, C. 866.

<sup>17</sup>3 Cranch, 267.

<sup>18</sup>166 U. S. 395; 6 Wall. 280.

dismissing the case for want of jurisdiction, the court, through Mr. Justice Miller, said: 'In the case of *Hepburn against Ellzey*, it was decided by this court, speaking through Chief Justice Marshall, that a citizen of the District of Columbia was not a citizen of a State within the meaning of the Judiciary Act and could not sue in a Federal court. The same principle was asserted in reference to a citizen of a Territory in the case of *New Orleans against Winter*, and it was there held to defeat the jurisdiction, although the citizen of the Territory of Mississippi was joined with a person who, in suing alone, could have maintained the suit. These rulings have never been disturbed, but the principle asserted has been acted upon ever since by the courts when the point has arisen.'

<sup>19</sup>

By the Judiciary Act of 1789 the Supreme Court was given original jurisdiction of all controversies of a civil nature between a State and citizens of other States or aliens, and also exclusive jurisdiction in cases where a State is a party. Such, then, being the condition of the law, a most important and far-reaching case was decided. One Alexander Chisholm commenced an action of *assumpsit* in the Supreme Court against the State of Georgia, and the process was served on the Governor and Attorney-General of the State. Later, the judgment of the Supreme Court was announced and its jurisdiction sustained. All the justices who heard the case filed opinions, some of which were very elaborate. It is a self-evident fact that the case received the most careful consideration. We believe that it is not out of place to review briefly some of these opinions.

Mr. Justice Wilson uses this language: "Another declared object of the Constitution is 'to establish justice.' This point points, in a particular manner, to the judiciary. And when we view this object in conjunction with the declaration 'that no

<sup>19</sup>6 Wall 287; 121 U. S. 631; 151 U. S. 368; 166 U. S. 395.

State shall pass a law impairing the obligation of contracts,' we shall probably think that this object points in a particular manner to the jurisdiction of the court over the several States. What good purpose could this Constitutional provision secure if a State might pass a law impairing such an obligation or right, with no controlling power?" Mr. Justice Iredell contended that it was not the intention to create new and unheard-of remedies by subjecting sovereign States to actions at the suit of individuals, but only, by proper legislation, to invest the Federal courts with jurisdiction to hear and determine controversies and cases between the parties designated that were properly susceptible of litigation in courts. But in his opinion he uses this language: "The extension of the judiciary power of the United States to such controversies appears to me to be wise, because it is honest and because it is useful. It is honest, because it provides for doing justice without respect to persons, and by securing individual citizens as well as States in their respective rights performs the promise which every free government makes to every free citizen, of equal justice and protection. It is useful because it is honest; because it leaves not even the most obscure and friendless citizen without means of obtaining justice from a neighboring State; because it obviates occasions of quarrels between States on account of the claims of their respective citizens; because it recognizes and strongly rests on this great moral truth, that justice is the same, whether due from one man to a million, or from a million to one man; because it teaches and greatly appreciates the value of our free republican National Government which places all our citizens on an equal footing and enables each and every one of them to obtain justice without any danger of being overborne with the might and number of their opponents; and because it brings into action and enforces the great and glorious principle that

the people are the sovereigns of this country, and consequently that fellow-citizens and joint sovereigns cannot be delegated by appearing with each other in their own courts to have their controversies determined.”<sup>20</sup>

As soon as this decision of the court was announced, steps were taken to obtain an amendment of the Constitution withdrawing such jurisdiction. Accordingly, the Eleventh Amendment to the Constitution was proposed and ratified. That amendment reads: “The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens and subjects of any foreign power.” Those who read this amendment may at once conclude—and very reasonably, too—that the provision only prohibits suits against a State which are brought by the citizens of another State, or by citizens or subjects of a foreign power. But the well-understood Constitutional construction proceeds further than that, the principle of which, we might say, is almost unconnected with the amendment. For obvious reasons, as remarked by Hamilton, “the contracts between a nation and individuals are only binding on the conscience of the sovereign, and have no pretension to a compulsive force.” The great Federalist went on to say: “To what purpose would it be to authorize suits against States for the debts they owe? How could recoveries be enforced?” The same question was raised in the Virginia Convention by Patrick Henry and George Mason, and was answered by Madison and Marshall. “It is not in the power of individuals to call any State into court,” said Mr. Madison. “The only operation it can have is that, if a State should wish to bring a suit against a citizen, it must be brought before the Federal court.” This point Mr. Marshall empha-

<sup>20</sup>2 Dall. 419.



sized and said: "But, say they, there will be partiality in it if a State cannot be defendant—if an individual cannot proceed to obtain judgment against a State, though he may be sued by a State. It is necessary that it be so, and cannot be avoided. I see a difficulty in making a State defendant which does not prevent its being plaintiff."<sup>21</sup> "The security for State loans," said Mr. Webster, "is the plighted faith of the State as a political community."<sup>22</sup> "It is an established principle of jurisprudence in all civilized nations," adds Chief Justice Taney, later, "that the sovereign cannot be sued in its own courts, or any other, without its consent and permission; but it may, if it thinks proper, waive this privilege and permit itself to be made a defendant in a suit by individuals or by another State. And as this permission is altogether voluntary on the part of the sovereign, it follows that it may prescribe the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted, and may withdraw its consent whenever it may suppose that justice to the public requires it."<sup>23</sup>

So we fully understand that there are very great reasons not only why citizens of a State, or citizens or subjects of a foreign power, cannot be permitted to sue another State without first obtaining its consent, but also why citizens cannot bring an action against their own State without first obtaining its consent. In the language of Mr. Justice Bradley: "Can we suppose that when the Eleventh Amendment was adopted it was understood to be left open for citizens of a State to sue their own State in the Federal courts, whilst the idea of suits by citizens of other States, or of foreign states, was indignantly repelled? Suppose that Congress, when proposing the Eleventh

<sup>21</sup>No. 81, *Federalist*; 3 Elliot's Debates, 2d ed. 533, 555.

<sup>22</sup>Webster's Works, Vol. VI, 537-39.

<sup>23</sup>20 How. 527.



Amendment, had appended to it a proviso that nothing therein contained should prevent a State from being sued by its own citizens in cases arising under the Constitution or laws of the United States: can we imagine that it would have been adopted by the States? The supposition that it would is almost an absurdity on its face."<sup>24</sup>

While we believe we have somewhat cleared up the conflict in Constitutional construction of the subject under our consideration, there is still this question unsettled. Inasmuch as a State, as the sovereign trustee of its citizens, is clothed with the right and power of making an imperative demand upon another independent State for the payment of debts which it owes to citizens of the former, it may claim that even if it did surrender to the National Government its power of prosecuting the claims of its citizens against another State by force, it got in lieu thereof the Constitutional right of suit in the national courts.

There is no doubt but that one nation may, if it sees fit, demand of another nation the payment of debts owing by the latter to a citizen of the former. Such power is a well-recognized incident of national sovereignty, but it involves also the national powers of levying war and making peace. But the States are not nations. "They are sovereign within their spheres," says Chief Justice Waite, "but their sovereignty stops short of nationality. They can neither make war nor peace without the consent of the National Government."<sup>25</sup> Even assuming, for the sake of argument, that a State is a sovereign, as Japan or Great Britain is, we fail to see any substantial ground or principle that makes it the duty of one State to assume the collection of claims of its citizens against another State, if the citizens themselves have ample means of redress

<sup>24</sup>134 U. S. 1.

<sup>25</sup>108 U. S. 76.

without the intervention of their government. There is no necessity for their State to sue in their behalf when they can sue for themselves. Therefore, the special remedy granted to the citizens themselves must be deemed to have been the only remedy the citizens of one State can have under the Constitution against another State for redress of their grievances, except such remedy as the delinquent State itself sees fit to grant.

The consistent policy of the United States has been to preserve inviolate the sovereignty of itself and its constituent members. It is but natural, therefore, that this policy should seek a wider field for its expression. Any forcible collection of debt or action involving the autonomy of a sister republic on the American continent, the United States regards with disfavor, because of the Monroe Doctrine.

Among the very few political doctrines which control public opinion in America, the Monroe Doctrine ranks as the chief. The birth of this historical declaration was in December, 1823, when President James Monroe sent a message to Congress containing the following declaration: "The citizens of the United States cherish sentiments the most friendly in favor of the liberty and happiness of their fellow men on that side of the Atlantic. In the wars of the European powers, in matters relating to themselves, we have never taken any part, nor does it comport with our policy to do so. It is only when our rights are invaded or seriously menaced, that we resent injuries, or make preparation for our defense. With the movements in this hemisphere we are of necessity more immediately connected, and by causes which must be obvious to all enlightened and impartial observers. The political system of the allied powers is essentially different in this respect from that of America. This difference proceeds from that which exists in their respective governments. And to the defense of our own,

which has been achieved by the loss of so much blood and treasure, and matured by the wisdom of our most enlightened citizens, and under which we have enjoyed unexampled felicity, this whole nation is devoted. We owe it, therefore, to candor, and to the amicable relations existing between the United States and those powers, to declare, that we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety. With the existing colonies or dependencies of any European power we have not interfered, and shall not interfere. But with the governments who have declared their independence, and maintained it, and whose independence we have, on great consideration, and on just principles, acknowledged, we could not view any interpretation for the purpose of oppressing them, or controlling in any other manner their destiny, by any European power, in any other light than as the manifestation of an unfriendly disposition toward the United States."

Thus the famous Monroe Doctrine was announced to the world, and from that day to this has asserted itself as an international factor and served as the Mason and Dixon's line of the Western hemisphere. The older nations of Europe, however, assailed and ridiculed the doctrine as an unprecedented piece of arrogance which only served to protect the existence of the United States when the Holy-Alliance had its eye on America, and claimed it but an empty phrase. The criticisms themselves, however, suggest utter inconsistency. Is not the "balance-of-power" doctrine of Europe, saving Constantinople, like a Red Cross Hospital, from molestation by a stronger power? Is not the "sphere of interest and influence" doctrine rescuing China from final destruction? Are the "balance-of-power" and the "sphere of interest and influence" doctrines but empty phrases? The Monroe Doctrine is the supreme, indisputable, unreversible,

unwritten code of the American continent, and it grows as any other institution does, according to the growth of the people which created it. It is true that the Monroe Doctrine is credited to its immediate author, but it is also true that it is the embodiment of the political spirit of all America. This will be understood when we read in the Declaration of Independence, among certain inalienable rights of mankind, that "governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive to these ends, it is the right of the people to alter or abolish it." This will be understood when we remember the will of the first President, George Washington, when he said in his famous farewell address, that "the nations of Europe have important problems which do not concern us as a free people." It should be understood in considering President Madison's communication to Congress in January, 1811, in which he said: "I recommend to the consideration of Congress the seasonableness of a declaration that the United States could not see without serious disquietude any part of the neighboring territory in which they have in different respects so deep and so just a concern pass from the hands of Spain into those of any other foreign power." It will be understood when we know the draft of the Monroe Doctrine made by J. Quincy Adams, while Secretary of State, and which was communicated to Mr. Thomas Jefferson, who, on the 24th of October, 1823, replied: "The question presented by the letter you have sent me is the most momentous which has ever been offered to my contemplation since that of Independence. . . . Our first and fundamental maxim should be, never to entangle ourselves in the brawls of Europe. Our second, never to suffer Europe to intermeddle with cis-Atlantic affairs." When European nations proposed to extend the balance-of-power doctrine to the American continent,

President Polk, in 1845, in his message to Congress, said that the United States "cannot in silence permit any European interference on the North American continent; and should any such interference be attempted, we will be ready to resist it at any and all hazards." President Buchanan, in 1860, discussing the condition of Mexico, said: "even by force, should this become necessary, any attempt by these governments (European) to deprive our neighboring republic of portions of her territory—a duty from which we could not shrink without abandoning the traditional and established policy of the American people." President Grant declared in 1870 that "the Doctrine promulgated by President Monroe has been adhered to by all political parties; and I now deem it proper to assert the equally important principle that hereafter no territory on this continent shall be regarded as subject to transfer to a European power." President Cleveland's application of the Monroe Doctrine to the Venezuelan boundary question, having been objected to by Great Britain, he declared, in December, 1895, that "if a European power by an extension of its boundary takes possession of the territory of one of our neighboring republics against its will and in derogation of its rights, it is difficult to see why to that extent such European power does not thereby attempt to extend its system of government to that portion of this continent which is thus taken. This is the precise action which President Monroe declared to be dangerous to our peace and safety. It can make no difference whether the European system is extended by an advance of frontiers or otherwise."

President Roosevelt, in his message to Congress in 1901, also said: "The Monroe Doctrine should be the cardinal feature of the foreign policy of all the nations of the two Americas, as it is of the United States." The spirit of this expression, "the two Americas," has been, perhaps incidentally, but most em-



phatically, approved by Sen. Exe. M. Juis M. Drago, author of the now famous "Drago Doctrine." As the Argentine Minister of Foreign Affairs, he instructed the Argentine Minister at Washington, on December 18, 1902, proposing the adoption by all the States "of the two Americas" of a policy to this effect: "The public debt of an American State cannot occasion armed intervention, nor in any wise the actual occupation of the territory of the American nations, by a European." This is but a supplementary interpretation of the Monroe Doctrine. Lastly, when the second Peace Conference was held at The Hague, the plenipotentiaries signed the convention on the 18th of October, 1907, in order to avoid armed conflicts of a purely pecuniary origin between nations, they provided in it that "this stipulation shall not be applied when the debtor state refuses or leaves unanswered an offer to arbitrate, or, in case of acceptance, makes it impossible to formulate the terms of submission, or after arbitration, fails to comply with the award rendered." The United States, then and there, reserved the principles of the Monroe Doctrine, which was recognized in the first peace conference in the following:

"Nothing contained in this convention shall be so construed as to require the United States of America to depart from its traditional policy of not entering upon, interfering with, or entangling itself in the political questions or internal administration of any foreign state. It is equally understood that nothing contained in the said convention shall be so construed as to imply the relinquishment by the United States of America, of its traditional attitude toward purely American questions."

Thus the Monroe Doctrine for the first time in the history of the world formally entered and was integrally incorporated into the international code of civilized nations.

In the successive stages of American advance, however, this



political doctrine became and will become the center of attraction of severe critics, who say that the Republic of the United States, under an imperialistic doctrine, instead of growing morally triumphant, is internally sinking into moral decay. But this criticism, as those of the past, strangles itself by its severity and short-sightedness. The more severe the criticism, the stronger become the principles of the doctrine, like the spring which forces its way through mud and rocks and asserts its power and purity before its helpless obstructors. The destiny and course of the United States is marked out. The great drama of human history has worked itself out under the guidance of the divine hands. The glory of the American advance does not mean the fall of the older empires. Its tremendous expansion arose out of the purchase of Louisiana, the cession of Florida, and still later the acquisition of the great empire called Texas. The war with Mexico was followed by the acquisition of Oregon and California territories. Alaska and the Sandwich Islands were next gathered up. Now the nation, true to its destiny, reigns over possessions from Panama to the Philippines and from ocean to ocean, carrying its flag to the northern extremity of the American continent, as well as the interior of the Asiatic continent. The Monroe Doctrine is the advance-courier of the American onward-march, and the flag that follows it will never be lowered. The Monroe Doctrine means to scatter, far and wide, America's moral influence, not by might, but through certain inalienable rights of mankind. Should any nation attempt to overstep the demarkation line drawn by the sacred doctrine, we would observe that it should be done only after thorough preparation for the liveliest war the world has ever had. Among those European and Asiatics who consider the underlying principle and innermost secret of the American ideals and not the superficial, temporary, outward appearance,

all will agree with the Americans that the Monroe Doctrine is really a part of the Constitution, and grows as true democracy expands. This advance no power on earth can stay in its course.

The Monroe Doctrine has for its administrator the highest ideal of Christianity. To this ideal we owe the recent gathering of the nations at the Peace Conference at The Hague. To this is due the uplifting civilization and the installation of self government in Cuba, Porto Rico and the Philippines. This it is which has established a sort of central government in Washington of all the independent nations of the two Americas. Last and best, this ideal has struck off the fetters of Japanese feudalism and made Japan a foremost power on earth. This American political maxim is the battle cry in a war for the amalgamation of races and nations. Their ultimatums are protocols of peace. The forces will not be stopped until the Americans organize a world unity greater than the special sovereignty of nations can accomplish.

## CHAPTER XXIV

### THE JURY

**T**HAT the trial of all crimes and of civil suits where the value involved exceeds twenty dollars shall be by an impartial jury in the State or district wherein the crime was committed or the suit instituted is a Constitutional provision which is an integral part of the judicial system of the American State and nation.

We fail to observe anywhere a more valuable and instructive provision than this provision of the Constitution. It is valuable because in ascertaining the truth in regard to disputed questions of fact the jury is as useful as the judge. It has been demonstrated that the jury of "twelve" is as valuable for its purposes as an equal number of judges would be. "I am surprised," says Mr. Justice Miller, "to find how readily those judges come to an agreement on questions of law, and how often they disagree in regard to questions of fact, which apparently are as clear as law." We say that the jury system is instructive, because it creates in the individual citizens of all ranks a patriotic conscientiousness, and imbues them with the democratic consciousness that each and every man may be called upon to decide certain facts in the general interest of the justice of the country and to honorably aid in the administration of the law.

That the jury system, like any other human institution, is subject to evolution, goes without saying. The jury system of a thousand years ago was very nearly opposite to the system of

our own day. In those days the jury consisted of a great number, composed of those of the town council who were understood to be better posted and were more familiar with the facts of the case than the others. Their verdict, in a general way, served to mitigate the horrors of barbarism. To be qualified as a juror in those days, a man had to know the facts as far as possible. In our own day the juror is required to know nothing about the facts of the case. The written records during the fifteenth century show that the jurors suffered penalties for not rendering verdicts on their knowledge of the facts.<sup>1</sup> In the present century jurors may be punished just because they know the facts, if they officiate having such knowledge.

It is not our present province to inquire into the origin of the jury system. "The system of recognition by sworn inquest," says Stubbs, "was introduced into England by the Normans, and has relationship with Roman jurisprudence." Pollock and Maitland say that the system was not of popular but of royal origin. Some English jurists trace its origin to Alfred the Great. The jurors of olden times, when sitting as a jury, generally numbered between thirty and eighty, according to the rule of procedure at the given time.

As we have already observed, all human institutions are subject to evolution, which, as a rule, brings them nearer to perfection, especially in our day of the public press, telegraphs, telephones, and other instrumentalities. The jury system of this country is, like other things, being evolutionized for the better. At all events, the jury system must be maintained to the end, because it is as dear to the American citizen as the Constitution itself. The subversion of the jury system was one of the reasons for the Declaration of Independence by the

<sup>1</sup>"Trial by Jury," by Forsyth, in 1552; *De Landibus Legum Angliæ*, by Fortescue, in 1476.

American fathers. For in that instrument they declared that Great Britain had denied "the right to trial by a jury of the vicinage." We are here reminded that we have just cause to object to whatever arguments there are in favor of abandoning the jury system. Some such arguments by too far advanced citizens or by ungrateful foreigners we have had occasion to hear. When we thus object, we are aware that the Constitution is created by the people, who alone have a right to continue or discontinue the jury system. We all agree to that. But, so long as the Constitution remains our greatest charter and stands revered as it has always been, the proposal of any other system is *prima facie* unconstitutional.

We have heard here and there of trials in *habeas corpus* proceedings being had without a jury, and with which we do not find any dissatisfaction; so also are we entirely satisfied without a jury in cases of admiralty, bankruptcy, probate, divorce, contempt, etc. But the cases where trial by jury is guaranteed by the Constitution and the cases suggested are two distinct propositions. The Constitution and the laws of the State and nation always separate these trials from the trials that the Constitution specifically guarantees. We have heard the argument sometimes brought forward that the abandonment of the jury system is justifiable, because Scotland has abandoned the jury system and because Japan has no such system, yet the civilized nations, or the countries with laws, have received the latter nation into the society of civilized communities. These arguments cannot be justified from the American point of view. We may just as well permanently accept the fact that trial by jury will be, as it always has been, most dear to the American heart. Every State Constitution demands it for suits in the State courts, and "every new and revised Constitution," observes Judge Cooley, "repeats a guarantee of it." "It has al-

ways been," says the Supreme Court, "an object of deep interest and solicitude, and every encroachment upon it has been watched with great jealousy."

It was through the jury system that "the generous presumption of the common law in favor of the innocence of an accused person was carried into practical effect. And it was this system that practically stamped out in America that cruel presumption of the law in supposing the accused guilty until proved innocent."<sup>2</sup> Wherever there is a jury trial in an American court, Americans are thus pretty sure that it is almost impossible to convict an innocent person. The problem this country is now trying to solve is to make certain the conviction of any guilty person and thus to save the community. A successful way of accomplishing this without imperiling the rights of the accused will some day be worked out by American genius.

On examining the Constitution we find in one of the provisions that "the Supreme Court shall have appellate jurisdiction, both as to law and fact." This provision was so worded, it seems to us, as to give rise to a false theory. This view is confirmed by the fact that the founders of this country who framed the Constitution and were afterwards seated in Congress at once proposed an amendment, which, being adopted by the people, read that "facts tried by a jury shall not be otherwise re-examined in any court of the United States than according to the rules of the common law." Thus the great charter was changed to not only prevent the appellate courts from granting new trials on disputed questions of fact, but to insure the rights of an American to his Constitutional guaranty.<sup>3</sup> There may be other systems proposed which are better than

<sup>2</sup>156 U. S. 432. The presumption of law in favor of the innocence of an accused person was fully established in the Roman law and was preserved in the Canon law.

<sup>3</sup>121 U. S. 558.



the jury system; there may be proposed a better Constitution than ours; nevertheless, in the end the present Constitution, with the guaranties which it contains, among which is that of the jury system, is the best of all. The jury system creates in the citizen a more substantial, intelligent, and self-reliant moral character, one more commensurate with the varied demands of life under the administration of a republican form of government.

All criticisms which may be made against the jury system, alleging that the holding of this mode of trial is unsuited to the present day and that a jury selected from the body of the citizenship is incapable of understanding the issues and apt to decide unjustly because of its ignorance of the intricacies of the complicated facts and their importance, involving as they do life, liberty, and property—all such criticisms may be ignored and forgotten. Some suggest that three judges, instead of one, might take the place of the jury as judges of both law and fact. To be sure, there is this three-judge system instead of the jury in Japan. But for America we have good reasons and examples why the jury should not be done away with. "There was a time," says Mr. Justice Miller, "when I pronounced the jury system one of doubtful utility." The same jurist, whose opinion, by reason of his great learning and experience, is entitled to acceptance, says, after his twenty-five years' experience as a judge: "The jury system is a fair one, and, as a method of ascertaining the truth, is in the main as valuable as an equal number of judges would be, or any less number." A sober observation of the American jury system will make such dreamers as indulge in the idea of abandoning it at once put an end to their dreaming and realize that their false attacks upon it amount to absolutely nothing.

In every legal step which may be made toward the ultimate

decision of either a civil suit or the trial of a crime there are two distinct questions, known as "the question of law" and "the question of fact." Ever since the Constitution went into operation the authority entitled to the endorsement of the people of the country has most seriously guarded and approved the wisdom of the fathers of the country in their twofold disposition of legal responsibility. It is a self-evident fact that the American jury system will go on as it has always gone on. Therefore, if there is any one thing necessary for us to know thoroughly, it is the jury system. Let us now concentrate our attention on the functions of the jury as the officers of justice and of the courts.

"Jury," as used in the Constitution, means "twelve men, disinterested and impartial, not of kin nor personal dependents of either of the parties, having their homes within jurisdictional limits, and selected by officers free from all bias in favor of or against either party, duly impaneled, and sworn to render a true verdict."<sup>4</sup> They are ordinarily called a *petit jury*, as distinguished from a *grand jury*. *Petit*, of course, means "little," but they are so called not because their functions are less or smaller than those of the so-called *grand jury*, but to distinguish them from the latter. Before we proceed further in the main inquiry, the study of the *petit jury*, let us discuss, even though a digression, the American understanding of the so-called *grand jury*. A *grand jury* consists of not less than twelve nor more than twenty-three men, taken from the body of the community, and sworn to inquire into and to make presentment of offenses committed within their jurisdiction, twelve of whom, at least, must unite in any presentment. The jurisdiction of the *grand jury* is co-extensive with that of the court

<sup>4</sup>11 Nev. 39.

for which it acts, both as to the nature of the offense triable and the territory over which such court has jurisdiction.

When the grand jury is impaneled, they are usually permitted to select a foreman, whom the court approves; but the court may exercise the right to select the foreman for them. The foreman first takes an oath, and then the other grand jurors are sworn in in the same manner and act under the same oath.<sup>5</sup> The foreman acts as president, and the jury usually appoints one of their number to perform the duties of secretary. Because their proceedings are to be kept secret, no records are kept of the acts of the grand jury, except for their own use. Bills of indictment against offenders are then supplied by the prosecuting attorney or other officer representing the Government. The jury is also required to make true presentment of all such matters as may come to their knowledge otherwise than through their functions as jurymen. A grand jury can indict a person previously prosecuted before a magistrate; it can also indict offenses of public notoriety such as are within their own knowledge, or as are given them in charge by the court or sent to them by the prosecuting officers of the State. The witnesses for the support of the bill of indictment are to be summoned and examined in all cases under oath. If they disobey such summons they may be punished for contempt. Even members of the jury itself can testify as witnesses. A bill must be true in its entirety, not true in part and false in part. The jury are the sole judges of the credit and confidence to which a witness before them is entitled. Any person having knowledge of public offenses, of course, has the right to go, without

<sup>5</sup>In Japan there is no such system as the Grand Jury. There the public procurator, whom we call the prosecuting attorney, alone has the right of presentment of an offence. See Miyakawa's "Life of Japan," pp. 239-251.

being summoned, before the grand jury and disclose his knowledge.<sup>6</sup>

The grand jury, however, cannot compel information from the person indicted. According to the Supreme Court, it is a well-understood principle that the privilege given by the Fifth Amendment to the Constitution, that "no person shall be compelled in any criminal case to be a witness against himself," extends to a proceeding before a grand jury.<sup>7</sup> The grand juries of the Federal courts usually meet and adjourn on their own motion. In the States, too, they meet and adjourn upon their own motion, provided there is no law or order of the court that regulates their meeting and adjournment. As to the origin of the grand jury, say Pollock and Maitland: "The ancestors of our grand jurors are, from the first, neither exactly accusers, nor exactly witnesses; they are to give voice to common repute." And according to Crabb, "there is reason to believe that this institution existed among the Saxons."<sup>8</sup>

Having casually informed our readers of the grand jury, we now enter into a study of the petit jury, which is the jury referred to by the Constitution.

We read in the organic law of the Constitution, in Article VII of the amendments, that "no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law." By the "common law" in this amendment is meant what the Constitution denominated in the third article as "law," not merely suits which the common law recognized in its old and settled proceedings, but also suits to be ascertained and determined in contradiction to those settled proceedings, as where equitable rights were recog-

<sup>6</sup>2 Caines, 98; 31 Fla. 255; 25 Ga. 220; 110 U. S. 516; 7 Gray, 492; 9 Mass. 107; 11 Ind. 473; 67 Pa. 30; 14 Ala. n. s. 450.

<sup>7</sup>142 U. S. 547.

<sup>8</sup>Crabb, Eng. Law.

nized and equitable remedies were administered, as well as those in admiralty or maritime law where a mixture of public law and of law and equity is often found in the same suit.<sup>9</sup> We must here remind our readers that it is immaterial what changes may be made in the forms of action or pleading, since the nature of the controversies and the rights in dispute must determine the right to demand a jury, and not the form of remedy provided.<sup>10</sup> The amendment only preserves the right and does not extend it, and the privileges of a jury trial are demandable of right only in those cases in which the law gave it before the amendment.<sup>11</sup>

In cases of felony, however, the accused cannot waive the privilege of a jury trial, the jury being a necessary part of the court that tries him, nor can such privilege be made to depend on any condition, as, for example, upon an appeal from a court that sits without a jury to a court which allows one.<sup>12</sup> In civil cases in general, trial by jury may be waived, or may be deemed to have been waived unless demanded.<sup>13</sup> Although the jury sits with the judge to try the facts of the controversy, receiving from him the law, it has the legal power to disregard his instructions in matters of fact; and the judge, on the other hand, will not grant a new trial simply because his opinion upon disputed or uncertain facts differs from that of the jury.<sup>14</sup> But the jury must follow the judge's instructions as to the law, and if disregarded, then the judge will set their verdict aside.<sup>15</sup>

The Constitutional provision that the facts tried by a jury shall not be otherwise re-examined is essential to the preservation of the right of trial by jury. If this provision were not properly observed, it would defeat the right, because the ad-

<sup>9</sup>3 Pet. 433, 447.

<sup>10</sup>15 Mich. 322.

<sup>11</sup>51 Penn. St. 96.

<sup>12</sup>127 U. S. 540.

<sup>13</sup>2 McLean, 35; 3 Wood. & M. 38.

<sup>14</sup>Note, Cooley, Const. Lim., 6 ed. 506.

<sup>15</sup>95 U. S. 232.

versary might then remove the case from the jury to another court, there to be tried by a judge alone. A jury's verdict, so long as there is no fraud or illegality connected with it, is conclusive and final. But if a re-examination of their verdict is necessary, it must be done by another jury in a new trial. If the case is appealed to an appellate court, the facts are there examined only so far as may be necessary to ascertain whether any error of law has been committed to the prejudice of the party complaining of the verdict.<sup>16</sup> According to the Supreme Court, the Seventh Amendment to the Constitution applies not only to cases tried by jury in Federal courts, but also to such cases as are tried by jury in State courts and are afterwards removed to the Federal Supreme Court for review under its appellate jurisdiction.<sup>17</sup>

"A comparison of the language of the Seventh Amendment," says the Supreme Court, "as finally made a part of the Constitution of the United States, with the Declaration of Rights of 1777, with the ordinance of 1787, with the essays of Mr. Hamilton in 1788, and with the amendments introduced by Mr. Madison in Congress in 1789, strongly tends to the conclusion that the Seventh Amendment, in declaring that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law,' had in view the rules of the common law of England, and not the rules of that law as modified by local statute or usage in any of the States." We are perhaps repeating the same proposition, but we do well to repeat it, as this clause of the Constitution must be well understood. The Supreme Court, on this important point, also says: "It must therefore be taken as established, by virtue of the Seventh Amendment of the Constitution, that either party to an action at law in a court of

<sup>16</sup>9 Wall. 197; *Cooley*, Const. Lim.

<sup>17</sup>9 Wall. 274.



the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that when a trial by jury has been had in an action at law in a court either of the United States or of a State, the facts there tried and decided cannot be re-examined in any court of the United States otherwise than according to the rules of the common law of England; that by the rules of the law no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States.”<sup>18</sup> A trial by jury before a justice of the peace, however, does not prevent a re-examination of the verdict in a superior court. A justice of the peace partakes rather of the nature of a special commissioner or referee, having no other powers than those conferred by a local statute or law, and is not, properly speaking, a judge, or his tribunal a court; least of all is it a court of record. Although a local court permits a trial by a jury of twelve or any less number before a justice of the peace, such a jury is not a “common law” jury within the meaning of the Constitutional provision.

“In the courts of the United States,” says Mr. Justice Gray, “as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important and express his opinion upon the facts; and the expression of such an opinion, when no rule of law is incorrectly stated and all matters

<sup>18</sup>174 U. S. 1.

of fact are ultimately submitted to the determination of the jury, cannot be reviewed on writ of error."<sup>19</sup>

Thus from every point of view we have seen what the functions of the jury of twelve men are; but, before concluding, there remains to be seen what is meant in the American legal contemplation by the statement that "law is for the court and *fact for the jury.*" We have already stated that it is a legal necessity to distinguish the law from the facts, a distinction which has ever been and will remain an important factor in shaping the legal structure of this country and which is now an integral part of its judicial system.

We often use the expression "matter of evidence." We wish it specifically understood that this phrase is neither to be classed with "matters of fact" nor with "matters of law." It is something incidental and subsidiary thereto, and is connected with the reasoning processes employed in both matters of fact and of law. Indeed, it is merely the material and basis for reasoning. In other words, "evidence," in legal acceptance, "includes all the means by which any alleged matter of fact, the truth of which is submitted to investigation, is established or disproved." So we see that it is different from what we usually understand by the expression, "a fact for the determination of a jury."

To approach our present inquiry more closely, we have to note in a general way that courts pass upon a vast number of questions of fact that do not get on record or form any part of the issue. Courts existed before juries; juries came in to perform only their own special office; and the courts have always continued to retain a multitude of functions which they exercised before ever juries were heard of, in ascertaining whether disputed things be true. In other words, there is not and never

<sup>19</sup>118 U. S. 545; 174 U. S. 1.

was any such thing in jury trials as an allotment of all questions of fact to the jury. The jury simply decides some questions of fact. The allotment to the jury of matters of fact, even in the strict sense of facts which are in issue, is not exact. The judges have always answered a multitude of questions of ultimate fact or facts which form part of the issue. The jury simply decides some questions of fact. The power of the jury to decide matters of fact is limited; it relates only to issues of fact, and not to the incidental questions that spring up before the parties are at issue and before the trial. The jury has to do only with the questions raised by the pleadings, questions of ultimate fact.

As we said in the beginning of the present phase of the investigation, there is provided nowhere in the Constitution a more valuable and instructive guaranty than that of "the right of trial by jury." The insinuation that the jury system should be abolished, or that it is inappropriate to the spirit of the present time, we would characterize as founded on mistaken ideas of the nature and dignity of American citizenship.

## CHAPTER XXV

### THE LAWYER

THE lawyer is a product of intellectual civilization. Wherever there is a government there must be laws, written or unwritten, to redress the wrongs and protect the rights of the people. A government without laws is a mere *de facto* government, and falls short of such privileges and immunities as are accorded to a member of the society of civilized nations.

From the earliest dawn of human government to our time, the progress of mankind keeps pace with the rules of law that regulate any given society. The rise or fall of every state or nation, therefore, is most vitally connected with its laws. A lawyer stands as a devotee of the law, to have rights protected and wrongs righted according to his intellectual attainments. It is the lawyer's profession that gives the finishing touches to justice as a step towards the increasing civilization of a given society or generation.

In this profession we notice the examples of ancient virtue and liberty set by such intellectual giants as Demosthenes and Socrates of the Athenian bar. It was also this profession that adorned the Forum of the Roman Republic with the glorious names of Cato, Brutus, Cæsar, Cicero, and Scævola. It would be ungrateful, indeed, to omit the acknowledgment of the still surviving influence of the tribunals of England and Continental Europe, derived from such exponents of justice as l'Hopital,

LeTellier, A. Guesscan, Coke, Hale, Mansfield, and hosts of others. The American lawyer stands abreast of all others, for it was his profession that produced such men as Marshall, Bradley, Story, Webster, and Lincoln, all of whom have blessed and helped to civilize the world.

We need no further elaboration to prove the importance of the lawyer's profession when we state the fact that eighty per cent. of all the legislators who make up each house of the Sixtieth American Congress are lawyers. The same profession produced all the Presidents of the United States except six. They are also lawyers upon whom depend the practical working of the checks and balances system of the American Government, namely, the judges of the Federal and State courts. We do not hesitate to proclaim the self-sacrificing fidelity, the patriotism, and the learning of the American lawyer, for they have made possible the most self-directing and the freest republic the world has yet seen.

Of all lawyers, whether they be ancient or modern, whether of Great Britain, France, Germany, Japan, or any other country, the lawyers of America attract our special attention. The nature of the American Government itself stimulates their honor, integrity, learning, and intellectuality. It was by the pen of the American lawyer that the Declaration of Independence was written. From the brain of the legal profession also emanated the greatest charter of the nation, if not of all the nations, the Constitution of the United States. Upon this document depends life, liberty, property, reputation, freedom of speech, of press, and of religion.

Having thus historically reviewed this honorable profession, as well as the vitally essential position of the lawyers in directing the destiny of the American nation, which stands for the test and the study of all the people in the world, we will now

proceed a step further and endeavor to understand, from the Constitutional point of view, the American lawyer as he is. The Constitution declares that "the accused shall enjoy the right to have the assistance of counsel." The term "counsel" is synonymous with the words "attorney" and "counselor-at-law," sometimes designated simply as "attorney-at-law." The term "attorney" in America includes all classes of lawyers which are distinguished in England, such as "barrister," "solicitor," "attorney," and "conveyancer." In the American lawyer are combined the duties of the public prosecutor of Japan, the Japanese official attorney for the state. However, before we enter into a discussion along this line, we must consider the absolutely essential subject of the admissibility of persons to this honorable profession.

An attorney or counselor-at-law is constantly spoken of as an "officer of the court." It is true that his is the most responsible of all professions, for to him is confided the most sacred of trusts—involving, as it may, the life, liberty, property, reputation, honor, and all the other essential rights of those who seek his counsel and enlist his services—and he it is who assists the court in upholding the majesty of the law. But it is also true that the attorney or counselor-at-law is not required to perform specific public acts nor to do specific duties devolved upon him in behalf of the general public. He merely exerts an indirect influence upon society that is based upon the personal relations between other members of that society.

Admission to the bar is an essential prerequisite to the filling of certain offices, such as those of prosecuting attorneys and judges of Supreme, circuit, district, and other Federal courts. But these public trusts and the functions connected therewith devolve only upon members of the profession by virtue of an independent election or appointment. Until thus desig-



nated, they can no more enter upon offices where the functions are of a public nature than can unlicensed persons wholly ignorant of the law. "Our conclusion is," in the language of Chief Justice Helm, "that attorneys-at-law are not *per se* civil officers within the meaning of the Constitutional phrase under consideration." They may enjoy the exclusive privilege of prosecuting and defending suits for clients who may choose to employ them. Various classes of persons are licensed in the several States or in the United States, with exclusive privileges in their employment, yet they are not public officers. "Physicians are also licensed," quoting the expression of Justice Plutt, "yet they hold no office of public trust, in legal construction. The fees of attorneys are fixed by law, and so is the compensation of *cartmen*, and *bakers*, and *ferry-men*."

The right to practice law is valuable to the possessor only. It cannot descend or be inherited, be bought or sold, nor be conveyed by a mere order of court. It is subject to forfeiture by a mere order of court, is subject to forfeiture by loss of moral character on the part of the possessor, and cannot, therefore, in any proper sense, be deemed "property," or amount to a "contract" in the Constitutional meaning of those terms.<sup>1</sup>

The Legislature, as an independent and co-ordinate branch of Constitutional government, is empowered to enact police legislation for the protection of the public against things hurtful or threatening to their safety and welfare. This power of the Legislature is absolute and unlimited. By virtue of this specific power the Legislature may prescribe the qualifications of attorneys to practice law. It is gratifying to note that many State Legislatures have prescribed tests as to the general legal qualifications as well as the preliminary educational qualifications of lawyers. In most States this preliminary education

<sup>1</sup>20 Johns, 492; 22 Cal. 321.

must be at least equivalent to a good high-school education. It is also gratifying to note that the Association of American Law Schools has recommended that "the executive committee, acting in pursuance of its duties, shall have authority to examine all the books of records of every member of the association, including the records of examinations and the answers of students to all questions put on examinations for the degree during the preceding year, and for this purpose may appoint competent and impartial agents."

This recommendation, and, more than this, the zeal displayed by the faculties of many law schools, together with many of the Legislatures' prescriptions concerning the so-called "diploma mills," have elevated the moral worth of the law graduates in America. But we should not lose sight of the fact that the power to pass upon the question of admissibility to the American bar ever has been and ever shall be vested in the judiciary, and in it alone—none other shall have the final authority to pass upon such admissibility.

According to Chief Justice Marshall in the case of *ex parte* John L. Tillinghass, Esquire: "If a counselor is entitled to admission to the bar of this court, the fact that his name has been stricken from the roll of counselors of one of the district courts of the United States for a contempt will not exclude him." Then, again, in the case of *ex parte* Dave A. Secombe, Chief Justice Taney emphasizes this authority of the judicial power, stating that "the statute of Minnesota concerning the admission and removal of attorneys differs but little from the common law, and leaves those matters very largely in the discretion of the court." The Supreme Court of the United States had occasion to assert the authority of the judicial power in this regard still more strongly. In the words of Mr. Justice Field: "The authority of the court over the attorneys and counselors

is of the highest importance; . . . the authority which the court holds over them, and the qualifications required for their admission, are intended to secure those qualities."

It is the duty of all the co-ordinate branches of constitutional governments to scrupulously avoid interference with each other. Concerning admission, debarment, or disbarment, the decision of the particular tribunal is final. If, unfortunately, an interference in the above particular with the dignity of the court should be made, the court will defend its dignity, as we find in the strong language of the Supreme Court of Wisconsin: "It will then be time for the courts to inquire whether the rule of admission be within the legislative or judicial powers. But we will not anticipate such an unwise and unbecoming interference in what so peculiarly concerns the courts, whether the power to make it exists or not. In the meantime, it is a pleasure to defer to all reasonable statutes on the subject."<sup>2</sup>

The official words and acts of the courts, whether erroneous or otherwise, as well as the orders of the court, have been held as excepting the judges from personal responsibility. This principle has been fully apprehended and applied to the facts as far back as legal history goes. So should it be for all time. On this point, five hundred years ago, Lord Stair said: "Were the law otherwise, no man but a beggar or a fool would be a judge."

When the judicial power is thus constitutionally settled, we need inquire but little whether membership of the bar depends upon citizenship or not. Because the question is vested entirely in the judgment of the court, all other branches of the American Government, legislative or executive, State or national, with whatever kind of authority, must keep their hands off.

<sup>2</sup> 7 Wall. 535; 39 Wis. 235.

It is a time-honored legal construction that although the word "citizen" conveys the idea of membership in a nation, the right of suffrage was not one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment to the Constitution, and that amendment did not otherwise add to those privileges and immunities. To support our understanding, we may rightly quote the language of Chief Justice Fuller, who, in reaffirming the decision in the case of *Bradwell* against the State of Illinois, says that the right to control and regulate the granting of a license to practice law in the courts of the State is not one of those powers that has been transferred to the protection of the Federal Government, and its exercise is in no manner governed or controlled by the United States citizenship of the party seeking such license.

Since the great authority and jurist has thus called our attention to this vital question, it is but natural, if not necessary, to conclude the subject under investigation with the opinion of Mr. Justice Miller, who delivered the decision of the Supreme Court in the case of *Bradwell vs. the State of Illinois*:

"The plaintiff asserted her rights to a license on the ground, among others, that she is a citizen of the United States. . . . We agree that there are privileges and immunities belonging to citizens of the United States in that relation and character, and that it is these and these alone which a State is forbidden to abolish. But the right to admission to practice in the court of a State is not one of these. This right in no sense depends on citizenship at all. Certainly, prominent and distinguished lawyers have been admitted to practice both in the State and Federal courts who were not citizens of the United States or of a State."<sup>3</sup>

We have so far been able to see, as the prominent jurists

<sup>3</sup>21 Wall. 162; 154 U. S. 117; 16 Wall. 130.

have seen, that authority over admission to the bar and debarment from the right to practice law is vested entirely in the judicial tribunals. What we next enter into is a discussion of the qualifications that the lawyer needs to be worthy of his calling. We do not refer to the qualifications which result merely in a pleasing exposition of the law or the gift of figures of speech. These belong altogether to the member of the Utopian bar. We mean the qualifications which result in a reasonable and logical exposition of the law—the essential qualifications of this profession.

To maintain a high standard, a lawyer is dependent upon his good judgment, integrity, and patriotism. Should any one lack in these prerequisite qualifications, he ought not enter into this profession, for it not only reflects upon his whole life, but also upon his fellow-members of the bar. The profession in America has a record of which every American has just cause to feel proud, and for which every other nationality has just cause to feel admiration and respect. But the mere fact of this reputation will do no good. This pride, when exaggerated and not commensurate and identified with moral integrity, is a source from which comes just criticism of the whole profession. In this connection, it is also true that this profession in the past has received some unpleasant criticisms which are entirely justified. But we are aware that there are other professions that are criticised, and that the profession of law is the most respected and honored of them all. And we are still further aware that the lawyers in America receive more homage and respect than the lawyers in other countries receive from their communities.

We fully realize, as an incentive to our self-respect, that in this country a large proportion of the highest talent and patriotism is to be found in the ranks of the lawyers. It is not in the



least exaggerating to say that the leaders of the American bar in a large city like New York enjoy yearly incomes of about \$500,000, or one million yen in Japanese money. Not all the lawyers, to be sure, but some of them, enjoy incomes as large as the combined salaries of one hundred members of Congress, or that of ten Presidents of the United States, or nearly as large as the combined salaries of the entire body of the Supreme Court. In other words, the incomes of some American lawyers are equal to the combined incomes of the ministers, the Resident-General of Korea, the governors in Manchuria and in Formosa, and the salaries of one thousand soldiers who serve as bodyguards to the respective dignitaries.

But we should also know the enormous amount of work that the lawyers in America have to accomplish in the performance of their duties. Those who are accustomed to see the German lawyer putting in his pocket the two German codes, the penal and the civil, or the Japanese lawyer carrying a pocketbook containing the six codes, the *Rop-posen-shio*, would not only hesitate to enter the profession in this country, but would also be amazed at the immense number of books and the enormous amount of work to "look up" for the preparation of a case. A lawyer in New York State alone has to "look up" eighty New York Common Law Reports, thirty-eight New York Chancery Reports, and one hundred and eighty New York Court of Appeal Reports. And this is not sufficient. He must "look up" the law in two hundred United States Supreme Court Reports, seventy United States Circuit Court of Appeal Reports, one hundred Federal Court Reports, and at least twenty Interstate Commerce Commission Reports. If he wants to practice generally in the United States it is necessary to "look up" the law from among two thousand State Court Reports. Such is the number of the American lawyer's law-books, not speaking of



about one hundred volumes of the Statutes and the Codes, and another one hundred of the Federal and State Court Reports that are added regularly year in and year out. The American lawyers have to get them, and to "look up" the law in them is as imperative upon the lawyer as the decisions of the courts and the statutes are.

It is certainly a hard task to become a good lawyer in this country. There was a time when such a person as the styled "born lawyer" was recognized. The qualification for admission to the bar was merely a matter of committing to memory, whether in the lawyer's office or in the law school, the abstract principles of law. As was said in the able address of John Wurtz, "the work of the instructor was limited to ascertaining that the students had properly memorized the text and to oral explanation. The student's memorizing feat being accomplished, he was admitted to the bar." But the days of this style of admission to the bar are days of the past. Now, not only a good high-school or even college education is required before beginning the study of law, but those who desire to enter this profession must go through a good law-school training. And when he is admitted to the law school "a young man had better give his entire time to the work of the school, and not attempt to combine it with work in a lawyer's office, or, indeed, work in any other place, unless absolutely needed to pay one's expenses. It is a poor school that cannot keep a student busy all the time, and if a boy is in such a school, he had better leave it, if necessary, for one which can keep him busy for twenty-four hours in the day."<sup>4</sup>

Indeed, the American law student has very much to study. In order to be admitted to the bar, he must not only be able to pass an examination in the general law in the American

<sup>4</sup>*Yale L. Jour.*, Vol. XVII, 2, p. 86; *Am. L. Rev.*, Vol. XXXIX, 4.

style, "as an art and science," but, above all else, he must satisfy the local jurisdiction as to his knowledge of local and special laws. We may readily understand how local enthusiasm is manifested in the matter of admission of the particular applicant to the particular bar, as well demonstrated by A. M. Kales when he wrote: "In New York, for instance, during the last four years, an average of 986 new candidates for admission to the bar have presented themselves each year. In Pennsylvania the average number of new applications in the same period has been 24; in Illinois, 253; in Massachusetts, 288; in Ohio, 195. Furthermore, in all these jurisdictions there are law schools in excellent standing, where already a very large percentage of students expect to practice in the State where the school is situated. In Columbia I am informed that about 60 per cent. of the graduating class expect to practice in New York; at Cornell, out of a graduating class of forty-seven, 80 or 87 per cent. expect to practice in New York; at the University of Pennsylvania, with a graduating class of sixty-one in 1906, only 3 or 5 per cent. are now practicing outside of the State of Pennsylvania (the rest are members of the Pennsylvania bar, and this, I am informed, represents a fair average in recent years); at the Law School of the University of Illinois, 80 per cent. expect to practice in Illinois; at Northwestern University Law School, 75 per cent.; at Boston University Law School, 85 per cent. of those graduating in June, 1907, expect to practice in Massachusetts; at the Cincinnati Law School, 90 per cent. of the students expect to practice in Ohio; at the law department of the University of Missouri, 95 per cent. of the whole enrollment expect to practice in Missouri."<sup>5</sup> In the University of Indiana Law School, 95 per cent. of those graduating in 1905 are actually practicing law in the State.

<sup>5</sup>*Harvard L. Rev.*, Vol. XXI, 2, pp. 111-12.

While the law student is thus impelled to specialize in the particular local law, he is sternly required to study the general law and thoroughly prepare to enter the profession as the master of the laws that are understood everywhere in the United States. As said by Eugene Wambaugh, "If he has appreciable success he will deal with business in all parts of the United States." The same law instructor further adds: "The ordinary instruction in the law school should be based upon general law, and the students' systematic work with local statutes and local decisions should be undertaken merely by way of a supplemental."

In studying law in the American law school, there are, among others, two conspicuous processes, one being the use of the text-book and the other the case-book system. As to the use of the first-named system, J. B. Scott says: "The text-book is not neglected, for otherwise each student would have to reconstruct in his laboratory the experiments of the ages." And as to the case-book system, we also quote from the same writer: "From their happy combination, knowledge of the law is produced. By means of this method the student is the chief factor; he trains himself; he discovers and reconciles difficulties, and receives in proper cases the guidance and assistance of the instructor." We wonder how the student who has only twenty-four hours in the day is able to prepare his lesson from all this complicated system and come out alive in the end. And we still wonder when we know that the American student does come out alive in the end, and, on an average, comes out very successfully. Happily, after he comes out of this hardship, and after due judgment of the court is sworn in and admitted to the bar, he is then an attorney or counselor-at-law. He at once "becomes an integral part of the court itself, as one of its officers who is to assist it in upholding the majesty of the law."<sup>6</sup>

<sup>6</sup>George L. Reinhard, *Am. L. School Rev.*, Oct. 1904; Dec. 1907.

But mere admission to the bar, however, is really only an "egg," borrowing the expression of the Japanese. An "egg" must be hatched, to be sure. Then what is the "setting"?

The sooner a law student is admitted to the bar the quicker he is confronted with an unwritten code. This code directs him to the full realization of his duties as a member of the bar, that he must never corrupt, or attempt to corrupt, or unduly influence the court. This is a crime greater than that of a traitor to his country, for, as his own duties explain themselves, he would then amount to the greatest enemy of the republic. While he is bound by the oath of fidelity to the court, and should at all times and under all circumstances conscientiously keep the same, yet he must be certain of the vested rights and privileges belonging to himself, which he must not only jealously guard, but also allow no judge to invade with impunity.

Fortunately, in America there are but few judges, if there are any at all, who so far forget the high and sacred duties of their office as to descend into the mire of politics and use their most noble functions for personal or political advantage. If, however, it so happens, the lawyer should say, as N. M. Edward, in speaking for good judges, said before the Pennsylvania Bar Association: "It is the right, privilege, and patriotic duty of every reputable practicing lawyer to insist and fearlessly demand that no other kind wear the judicial ermine." If a lawyer is threatened for taking sides against the Government, he should say as Sir Matthew Hale said when he was threatened by an obsequious Attorney-General: "I am pleading in defense of laws which you are bound to maintain. I am doing justice to my client and am not to be intimidated." Above all else, he should scorn to betray a trust for profit.

The American lawyer will never pride himself on the miserable honor of having thrown obscurity over truth. He is always

striving to make apparent the goodness of his course rather than the presence of his genius. With him, not victory but truth is the aim and end in the execution of his noble profession at the bar. But the price of his success is found in that he "lives like a hermit and works like a horse."

## CHAPTER XXVI

### THE UNWRITTEN POWERS OF THE COURTS

**P**RACTICALLY and theoretically, the legislative omnipotence of Congress is recognized by the undivided opinion of the modern school of constitutional study. The American Constitution declares, as the later decision of the highest court expressively construed it, that the powers of the American Government are divided and distributed to the three departments, so that the executive department may constitutionally execute every law which the Legislature may constitutionally make, and the judicial department may receive from the Legislature the power of construing every such law. Therefore it is unnecessary to recite the distribution and separation of the three departments. But constant care should be taken as to the demarkation line of the three powers, if we intend to go below the surface, although to keep the line always in view is a somewhat difficult thing. This is doubtless difficult, because we often read such a coined term as "judicial legislation," which practically means "judge-made law." The unreserved use of this coined term has, to a certain extent, induced a complicated proposition, almost amounting to a doubt as to which is better law, "judge-made law" or "Congress-made law"—a complication very distasteful to American scholars and very misleading to students of the American system of government. The worst complication of all grows out of the carelessness in keeping clear the demarkation line and mixing up political questions



with legal questions, and often jumping to the conclusion that the court may exercise political power. The political power is entirely independent of the question growing out of the constitutional separation of the three powers of government. Over political questions the courts have no authority, but must accept the determination of the political departments of the Government as conclusive. For instance, the adjustment of a dispute between States over the State boundaries is to be determined by the respective political authorities, and is entirely left out of the judicial province. After the dispute has been adjusted and agreement reached between the parties concerned, if a question arises under their agreement, then the judicial power may be invoked. The questions of the existence of war, the registration of peace, the *de facto* or *de jure* government of another country, the authority of foreign ministers or ambassadors, the admission of a State to the Union, the restoration to constitutional relations of a State in rebellion, the extent of the jurisdiction of a foreign power, the jurisdiction of the United States over an island in the high seas, and other questions that fall under such categories, are all political questions, and entirely different from judicial questions.<sup>1</sup>

The courts many times have disclaimed their power to exercise jurisdiction upon any matter properly falling under the denomination of the political power, and most emphatically have disclaimed the exercise of political power as belonging to the judicial department. "That belongs to another branch of the Government," says Mr. Justice Thompson. "The protection and enforcement of many rights secured by treaties most certainly do not belong to the judiciary. It is only where the rights of persons or property are involved, and when such right

<sup>1</sup> 9 Wall. 56; 3 Wheat. 246; 2 Pet. 253; 7 How. 1; 6 Wall. 50; 13 Pet. 415; 5 Pet. 1; 137 U. S. 202; 3 Wall. 407.

can be presented under some judicial form of proceedings, that courts of justice can interpose relief."<sup>2</sup>

It is also very proper that the judiciary, in passing upon a question of law which has been considered and acted upon by the other departments, should give great weight to their opinions, especially if they have passed unchallenged for a considerable time.<sup>3</sup> "The judiciary have often yielded to it when the correctness of a practical construction of the law by the executive department in performance of its own duties was in question; but they cannot do this when, in the opinion of the court, the construction is plainly in violation of the Constitution."

It may be a repetition to say that the judiciary is the final authority in the construction of the Constitution and the laws of the United States, and that its construction should be followed by the other departments. Its judgments thus become the precedents binding the future on the points covered by them, and a disregard of these judgments, whether by private citizens or by officers of the Government, could only result in new controversies, to be finally determined by the judiciary in the same way. In the expression of Mr. Cooley, "the judiciary, though the final judge of what the law is, is not the judge of what the law should be." It may also be a repetition to say that the judicial power is ever exercised for the purpose of giving effect to the will of the Legislature, or, in other words, effect "to the will of the law."<sup>5</sup> However, its authority is co-ordinate with that of the Legislature, and is neither superior nor inferior to it. Each with equal dignity must move in its constitutionally directed provinces. Although the court is constitutionally vested with power to decide controversies arising from a conflict between the form as expressed by the Legislature and the

<sup>2</sup>5 Pet. 51.<sup>3</sup>1 Cranch, 299; 10 Wheat. 51.<sup>5</sup>9 Wheat. 738.

form expressed as the will of the people by the Constitution, in favor of the Constitution, and to refuse the enforcement of the legislative enactment, it must exercise great caution and reluctance.

The judicial power is necessarily exclusive. Even where all the powers of government are in Parliament, as they are in England, or where they are in the hands of the Emperor, as in Japan, there still exists the judicial power distinctly independent of and equally as dignified as the legislative, even though both are exercised by the same agency of government. It may be true that the written Constitution of France, like the Swiss Constitution, expressly prohibits the judicial power declaring the legislative acts void, yet there exists a judicial power separately from the legislative power. It may be doubtful whether the judicial tribunals of Germany can decide the law of the Empire unconstitutional, but it is true that the judicial powers of Germany, as of Canada, can decide when the provincial or local laws conflict with the organic or national laws.

From every consideration, we conclude that in every constitutional country the judicial power exists and operates quite independent from the legislative. But in America there is one distinguishing phenomenon which stands out as an exception to the general understanding of the separation of the governmental powers. It is that power which makes the American Constitution better than any the world has ever dreamed of, better even than the Convention that framed it or the people that adopted it ever dreamed of—the judicial power of Constitutional construction. The English doctrine of the absolute inviolability of the legislative act and the Japanese doctrine of the absolute constitutionality of law never have acquired a footing in the governmental system of this country. In order to support the American doctrine, there are approximately five grounds under

the American Constitution which give the court the power to hold a legislative statute unconstitutional.

First is the wording of the Constitution, which is as broad and general as the Constitution itself. This fact necessarily calls upon the court to apply the specific legislation to a specific instance and to compare this specific application with the Constitution. Secondly, the Constitution imposed a limitation upon the Legislature in its Constitutional relation to the other departments of the Government, which fact itself necessarily compels the courts of justice to protect the Constitution from being encroached upon. For example, the judicial power which is constitutionally vested in the court, among other grants, expressly includes, as a matter of course, the right of the court to regulate its procedure in its own way, to order in its own way the rules of evidence and the applications thereof, the admission of attorneys to its bar, and the regulation of the impaneling or installing of a jury. These legitimate authorizations of the court may, if the court does not closely watch, sometimes be assailed by the acts of the other co-ordinate branches of the Government. Thirdly, the American Constitution was born and brought up in the midst of an environment and heredity which taught that the validity of a statute, as James Otis said long before the Constitutional Convention, "must be determined by the courts of justice." Judicial questions of a national character were determined even under the Articles of Confederation, of which the present Constitution is an improvement, and the colonial courts are filled with instances where legislative statutes were declared unconstitutional. For that matter, the American lawyers would say that the judges were the recognized factors in the organized communities of ancient days. The judges were applying the laws before the legislature ever put in its appearance in the history of jurisprudence. Then, again, the courts,

from the commencement of the human record to the present, have been constantly in session, dealing with the actual needs of different communities or countries, laying before them precedent upon precedent of unwritten law, which the legislature practically did not put its hands upon.

Thus judicial decisions were from time immemorial crystallized into the very customs of the people and society, becoming integral with and inseparable from them. Legislatures are very impulsive and active in enacting laws that meet the needs of society in modern days. But the legislatures are not alone active. The courts, too, are active. It is true that the legislatures are making very many laws, but they have much to do in correcting, modifying, and expanding the points of law already adjudged by the courts of justice. Fifthly, the characteristics of the American people are as varied as those of the Italians or French. It is against the American idea for an American to yield any rights, the authority for which he finds within himself. This does not mean, however, that the American people are anxious to extend their hands to gain what does not belong to them. Either of these phrases will explain it: "The square deal," or "No big stick." The judiciary, like the legislative or executive, will not stand in the way where it believes the rights of the other departments reach; so also it cannot allow the other departments, in any shape or form, to encroach upon the rights which the court inalienably possesses. Now, by reason of the industrial and economic progress of the country, the litigations between man and man are closely connected with the rights of groups of men and of combinations of groups of men, each of which questions requires energy and thought proportionate to the elements it involves. And the number of cases continually crowding the courts is in the same ratio as the continual increase in the country's wealth and prosperity. Still, the judges,



even under comparatively smaller salaries than men of other professions, are meeting the situation, thus amply demonstrating the American characteristics.

The unlimited extent of the judge's power of construction has been, ever since the Constitution began its majestic operation, a fruitful topic for discussion, and a subject of both approbation and disapprobation. Many eminent authorities in this country and in Europe have participated in the discussion in a most determined fashion. On our part, we are concerned but to gather the best opinions. Still, we have much to bring to our observation, for, as Mr. A. A. Bruce says, "everywhere in America is to be found a government by the judiciary in matters which are social and industrial as well as in those which are political and governmental. . . . There is now to be noticed a determination by one party to place and keep the judiciary elective in politics and immediately responsive; by the other, to keep it under national appointment, if possible, possessed of a life term. 'Let the jury and people decide,' is the motto of one party. 'The court must decide,' is the motto of the other."<sup>7</sup>

Mr. Bryce considers it a weak point of the Federal Constitution that decisions of the Federal courts may be obtained in reversal of former decisions by the appointment of judges to fill vacancies favorable to such reversal, or, in case there be a vacancy, by the joint action of Congress and the Executive in increasing the number of judges. Mr. Bryce supports his argument by citing the Legal Tender cases. We would agree with the distinguished English author if the circumstances were as they appear to be. But we would also like to advance the other side of the argument by saying that nearly a quarter of a century before, the people had felt the need of increasing the num-

<sup>7</sup>*The Green Bag*, Nov. '07.



ber of Federal judges, and official steps to that end were taken long before the cases the English author cites were decided. The judicial power is vested not only in the Supreme Court of the United States, but also "in such inferior courts as Congress may from time to time ordain and establish." The number of Federal judges have been increased by scores, and in many cases they have arrived at decisions adverse to those of the former judges. Did the executive act of appointment therefore override the omnipotence of the judiciary, which, under its inviolable charter, is a dignified agency of the Government equal with the Executive? It is well to remember what the last section of the Constitution commands: "The Senators and Representatives before mentioned, and the members of the several State Legislatures and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution." That the Executive and Congress conspired against the Judiciary and deliberately prepared for such a serious contingency as the refusal of the courts to adopt their opinions by increasing the numbers of the judgeship, and thus subverting the majesty of the law, we are constrained to receive only with great doubt and skepticism. On this account, however, we are not and cannot be pessimistic. On the contrary, we feel the weakness of the judicial branch of the Government when we realize the broadening tendencies of the other co-ordinate departments. The single consideration of the new relationship of the judiciary to the advance in civilization and the greater complexity in industrial and economic forces will suffice for a justification of the above-mentioned change in judicial construction. The judges are compelled to admit the force of the American progress. It is but reasonable to conclude that the power of Constitutional construction should be co-extensive with the develop-

ing power of the people. But we unreservedly agree when the same English author says that the American judge does not, like the European judge, "walk in the narrow path traced for him by ordinary statute." The judge's power of construction is certainly broad and delicate, affecting as it does the very foundation of Constitutional principles.

"I think, on the whole," says Wm. H. Taft, "that the division of power between the United States and the States has been admirably maintained, and that this has been possible because it has been ultimately left, in most instances, to the decision of a tribunal less subject to political influence than any other branch of our government. That tribunal has opportunities for maintaining a consistent view from the foundation of our government to the present day greater than that enjoyed by any other authority in either State or national government."<sup>8</sup>

Now our real study of the Constitution has practically reached the point where we are concerned with not only the written Constitution, but also with the study of judicial decisions.

The judicial decision constitutes a source of law, but because the source of law is indicated by the judge it does not necessarily follow that the judges are making the law. "In the ordinary use of language it will hardly be contended that the decisions of courts constitute laws," says Mr. Justice Story. "They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed, and qualified by the courts themselves whenever they are found to be either defective or ill-founded or otherwise incorrect."<sup>9</sup> To follow closely the line of demarkation thus far drawn between legislation proper and judicial decision we must know

<sup>8</sup>Wm. H. Taft, in addressing the Brooklyn Bar Association, Feb. 29, 1908.

<sup>9</sup>16 Pet. 1.

more about the suspicious yet undeniable fact that the judicial decision sometimes becomes a source of law. The sources of law may generally be said to consist of the statutes made by the Legislature, the judicial decisions of the courts, and the public policies and customs.

The statutes are laws established by acts of the Legislature or the written will of the Legislature, prescribing certain rules of civil conduct. The legislative act being a rule of civil conduct prescribed by the omnipotence of the legislative power, is of conclusive authority upon the judges. But expressly prescribed terms and the cases arising under them from the ever-varying exigencies of the times are distinct propositions. Herein lies the line of demarkation: on one side of it fall the rules made by the exclusive authority of the Legislature; on the other, a process of deductive reasoning upon which depends the construction of the court in its application of the prescribed rules to the particular case. The former is simple in form, generally unyielding, an iron-clad rule. The latter is complex in form.

The judges, whenever they are to decide a case presented before them, first consider the will of the Legislature, or the iron-clad rule. If the statute does not provide specific rules for the specific instance, they take the previous court decisions for comparison by analogy, as well as considering the public policies and customs. The public policies and customs are not themselves as definite or concise as the statutes or the decisions, but only throw light upon the reason of the case and upon what is the public good. They often stand in advance of even the statutes or decisions, as do certain time-honored legal maxims or the writings of distinguished authors which have become crystallized into the golden rule.

Naturally, the sources of law conflict, and the most vexatious problems often present themselves before the judges, who

have to make the way clear before deciding what is law in their judgment. "We are presented in this case," says a well-known English jurist, "with an apparent conflict or antipathy between rights that are equally regarded by the law—the right of the plaintiffs to be protected in the legitimate exercise of their trade, and the right of the defendants to carry on their business as seems best to them, provided they commit no wrong to others. The plaintiffs complain that the defendants have crossed the line which the common law permits; and inasmuch as for the purposes of the present case we are to assume some possible damage to the plaintiffs, the real question to be decided is whether, on such an assumption, the defendants in the conduct of their commercial affairs have done anything that is unjustifiable in law."<sup>10</sup> If, however, a statute can be plainly applied to a particular case presented before the court and there is nothing that contradicts the justice of the statute, the courts seem to have no further trouble in deciding the case. If a case comes up analogous to one previously decided by the court, and there exist no distinctive features between the two, the judges do not seem to have much trouble in arriving at a conclusion. If, however, it comes to such a pass that the public policies must be preserved, and there exists nothing that conflicts with them, or where there are conflicting decisions, the consideration of public policy seems to prevail. Different courts, by the force of different circumstances—industrial, economic, or those of custom—are bound to arrive at different conclusions. Hence there are revisions, corrections, qualifications, and reversals of previous decisions.

Should any one look at the varying decisions with suspicious eyes, we advise him to look also at the varying periods and circumstances when they were made, and then he will be satis-

<sup>10</sup>23 Q. B. D. 598.

fied. He will soon know that the life of law keeps pace with human progress. It is not only the judges' decisions that are susceptible to change. Human judgments in all other professions are ever changeable and changing. Did not even our teaching of God change to keep pace with men's needs? We need not argue the unreasonableness of tying the judges hand and foot and leaving them behind in the current of human progress, so that the legal profession alone would be left behind in the general progress of the race.

Judicial decisions being a source of law or a part of law, it might be argued that law is being made by the judges. Customs, too, are a source of law. It is a custom that "the smaller becomes a saleswoman's wage, the larger becomes her pompadour." May it be said that the saleswoman, therefore, makes the law? No more can it be said that the judges make law.

The judicial decisions carry with them binding authority and the reverence that is accorded to precedent. They also help the growth and development of written as well as of unwritten law. Fundamentally, the making of law rests in the legislative arm of the Government, and fundamentally the decisions of the courts point out to men the existence of a higher law, or law of God. "Judge-made law" or "judicial legislation" is an undesirable, unnecessary, and misleading coinage of language. It creates nothing but confusion. It invites us to look back to the awful scenes in bygone days when the judges of the despot Charles II boasted of their judicial legislation in which they had completely outdone Parliament in making law.

Judges are but human, in America and elsewhere. Judges do not consider themselves infallible. If there is anything wrong, it is for the people, who are responsible, to make it right themselves. The blame does not lie with the judges, but with those who would clothe their fellow-men with a singular om-



nipotence. In Japan, a single stroke of the Emperor's pen wiped out thralldom and made the Eta, or the outcast class, of equal rank with the peers and knights. The Czar, if he chose, could abolish any system of his Empire. The German organic law is the handiwork of Bismarck and Moltke, and the reform of any system of the great Empire of Japan may be accomplished only by the Emperor's trusted servants. But in America, even a single amendment to the Constitution cannot be made as it could be in Germany, Japan, or Russia. It is necessary in this country that every citizen of the eighty million must direct what is his will in the proposed reform. Every individual American is directly responsible for the fallibility or degradation of the governmental system of his country, and even for the irresponsibility of the officers, of every denomination. It is for the American citizen to overcome evil, if he sees it, by his own initiative, self-direction, and determination. To be an American tends to perpetuate this spirit. Herein lies the peculiar feature of the American openness and their often unreserved exposure of their own merit and demerit. The people in foreign countries, who are used to keeping secret their defectiveness from foreign observers, have stood in open-mouthed amazement at the American way. In America there is nothing secret about anything political. All is done for the solemn inspection and judgment of the entire population of the United States as well as of the whole world. This phenomenal peculiarity is often revealed even in the legal profession and in American legal literature, exposing, or rather criticising, the shortcomings of the judicial system of the Government.

"In many of our States, judicial offices," declares an American lawyer, "have become the prey of spoilers. They have already degraded the bench so far that there are few localities where the judicial office maintains, in the minds either of its



occupants or of those for whose protection it exists, the exalted position it once had and ought always to occupy. The diminutive mental stature of these spoilsmen enables them to inject their poison unobserved, for the mosquitoes which cause yellow fever are not easily detected. But while Gulliver slept, Lilliputians bound him in fetters his great strength could not break. An honest judiciary is the last defense of the republic, and this defense will be destroyed if things continue to go as they are going!" A judiciary controlled by selfish politicians is more dangerous to our national existence than slavery ever was, because it is more insidious and more secret. The grip of machine politics upon our people is such that our Government, though in name democratic, is rapidly becoming the most tyrannical in Christendom. "Take a poor man with a poor lawyer," declares another lawyer, "a case argued with a giant on one side and a pigmy on the other, and the judge hearing the case whose associations have been with the rich. What show does the poor fellow get? If your case is just, that counts nothing. Even if you could, you could not get along by yourself. You must have a lawyer. You can have any kind of lawyer you can pay for. But you cannot try your own case. You do not know how. The judge would not help you. He sits there to umpire the game, and nothing else; it is all a lottery. If your case is just, that counts nothing. It depends upon a dozen things which make dice-shaking a certainty compared with your game of chance."

Many exposures lead to exaggeration, if not to rashness and incautiousness. To those who believe in the sacredness of the judiciary some such remarks are very distasteful. But the openness and unreserved criticism with which some direct their charges against persons who hold offices of trust is not limited to the judiciary. Nay, in this country the other departments

of Government are much more severely arraigned than the judiciary. The representatives of the States who sit in their legislative chamber have been scathingly arraigned on the charge of the "treason of the Senate." The President of the United States, whose reputation is and must be the reputation of the country, or which at least reflects the national credit in foreign countries, may be the most attacked personage in the country. He may be designated by such epithets as "muck-raker," "big stick," or even "impostor," or "destroyer of the prosperity of the country." There is scarcely one public man who has not been attacked for his social station. He is accused because he is unfortunately wealthy. He is called of "no account" because he is unluckily poor. He is not an American if he has not some one who is always against him. The harder he struggles for the public good, the higher his individual importance becomes among his fellow-beings, that much more is his head exposed to the blowing of the winds of criticism. In America, the recognition of one's success does not come with the gentleness and pleasantness of the dewdrops; the recognition will most surely come in a storm of criticism. But let it be remembered that the tempest comes to purify the atmosphere. The watchfulness of one citizen against another, however, must be taken as an important factor in stimulating competition in attaining a healthful political condition. This may work harm in a country where a pessimistic or submissive view of everything is taken, but not in a country like America, where an individual stands upon his own rights and footing, where his existence is the very breath of optimism and ambition, and where he is partly responsible for the rise or fall of the nation.

Strange to say, the American judges, ever since the organization of the Government, have been the least criticised and least arraigned public officers. On the contrary, they have been

the most respected and most honored among all the dignitaries of America. We may attribute this strange phenomenon to the fact that the only thing which the American will obey is law, and the only thing in which he will know the meaning of obey is his relation to law. The judges of the United States and of the several States are thoroughly conscious of their exceptional privileges and immunities, also of their correspondingly great responsibilities as the only interpreters of the law, to whom alone the final construction of the law of the land is unreservedly entrusted. All the American judges realize this.

The American people know that the strictest obedience to law is the foundation stone of the strength and permanence of the republic. This has been understood by the American people ever since they founded their country. Departure from this common understanding tends to involve national ruin by creating anarchy. Superficial observers who see but the so-called material side of American progress, or those who are devotees of the game of profit, do wrong when they do not appreciate the fundamental proposition that the people are the backbone of progress. Such superficiality not only fails to grasp the true situation, but also fails to appreciate the true meaning of the beneficent opportunity upon which the Americans build their higher and nobler civilization. The statements recently made that the American people have changed their allegiance from the great principles which they embodied in the Declaration of Independence to the worship of the "almighty dollar," and that the American people have changed from their appreciation of the Bible to the worship of the sword, are evidence of the fact that their authors are but shallow students of the America of to-day.

To illustrate the fallacy of such statements: A few years ago, in Washington, D. C., we happened to enter one of the

local churches. We saw among the younger Sunday-school scholars a man holding a Bible in his hand, teaching the tidings from God, a man whose duty it was to settle the disputes of men in the business world, a man whose thirty years' judgeship in the Supreme Court has just been celebrated as the pride of Kentucky—Mr. Justice Harlan. Some time later, in Chicago, we happened to come across a local newspaper that reproduced a speech containing this wonderful remark: "Our country of liberty is not a country only for the white race. Ours is and must be the country of all races"—a speech which was uttered by an American whose legal knowledge it is not necessary for us here to emphasize—Mr. Justice Brewer. We are impelled by the force of the facts to recall the tradition about the Pilgrim Fathers, who claimed the promise of God to Abraham as the sanction of their voyage. Obedient to the divine command, they forsook their country. On the morning they were to set sail from the harbor of Delft Haven the Pilgrim Fathers formed a solemn procession. Reverend Robinson, having a Bible in his hand, then told them that more truth and light were yet to break out of God's word: "Get thee out of thy country, and from thy kindred and from thy father's house, into a land that I will show thee; and I will make thee a great nation; and in thee shall all families and nations of the earth be blessed." These are but a few examples, and these men are but a few Americans among innumerable others who constitute the America of to-day and who are taking the command of God to Abraham and His promise to the father of the faithful as a pledge vouchsafed unto them and to their children after them. The Americans do not have to ask God for material treasures. He has already granted them that in abundance. It is theirs to thank Him for the strength to perpetuate their institutions firm as heaven and earth, and to bless all peoples and nations with an

example of peace, happiness and prosperity. The quickest way to the brotherhood of man demands as a necessary organization therefor, not kings, or nobles, but wise magistrates whom the people have elected, and who administer equal laws which the people have framed. Realization of that brotherhood is in sight, for the Palladium of the Republic is in the courts of law. The statues of the dead and the figures of the living judges on the bench are the ceaseless sources of our gratitude and veneration. To them we owe the vitalization of the Constitutional provisions. It is they by whom the Congressional and Executive acts have been made to breathe, and the unformed and immaterial phenomena transformed into the living forces comprising the written and material wealth, progress and prosperity of the United States, and the various States.

There is not a blot on our body politic to-day that the better element of the people could not remove if they resolved to do so. They will so resolve in good time, as they have always done in the past. There is not a defect or deformity in our political administration that they cannot and will not correct by the peaceful expression of their sober convictions and in the legitimate way pointed out by their free institutions. It would be well always to keep in mind this reserved power of the people so immediately connected with the preservation of their Government. It has been the source of safety in all times past, in peace and in war; and it is to-day, and will ever continue to be, the omnipotent power that forbids us to doubt the complete success of free government. The virtue and intelligence of the people are the sure bulwark of safety for a republic.

It may be said that the American Republic is not perfect in its administration or in the exercise of its vast and responsible powers; but when was any government so? When shall it be so? No human work is perfect. The accusations made



against our public servants are not the peculiar creation of this age. The allegation of widespread demoralization in the moral and political standards of public officers of our own day is no more novel than in any of the generations of the past. We notice absolutely nothing said of our public servants that was not said of those whose memory the Americans now sacredly adore. License of speech is the greatest defect of liberty, and it has ever asserted its immunities with tireless patience and industry. It was as irreverent with John Marshall, Hamilton, and Henry as it was with Washington, Grant, and Webster. It racked and pained Jefferson, Jackson, and Lincoln. It criticises the living heroes of our own day. History will repeat itself. When unborn generations shall turn to history for the time of most unselfish and enlightened devotion to the republic, no age in all the long centuries of freedom in the New World will furnish to them higher standards of judgeship, heroism, and statesmanship than the now defamed and unappreciated time in which we live. Chronic and spasmodic despair and distrust are as old as the history of free government. Uncover the grave of buried and forgotten times, seek that which was then hidden from the nation, gather up the personal letters, diaries, and the public journals which give the examples now so earnestly imitated and to which modern campaign eloquence is so much indebted, and in the degenerate and demoralized present your despair will be softened and your distrust and indignation at current events will be tempered. You will then learn and be satisfied that, with all their many faults, the American people grow better as they progress.



APPENDIX I  
MAGNA CHARTA



## MAGNA CHARTA

THE GREAT CHARTER OF ENGLISH LIBERTY, GRANTED BY KING  
JOHN AT RUNNYMEDE, JUNE 15, A.D. 1215.

**J**OHN, by the grace of God king of England, lord of Ireland, duke of Normandy and Aquitaine, count of Anjou: to the archbishops, bishops, abbots, earls, barons, justices, foresters, sheriffs, provosts, serving-men, and to all his bailiffs and faithful subjects, greeting. Know that we, by the will of God and for the safety of our soul, and of the souls of all our predecessors and our heirs, to the honour of God and for the exalting of the holy church and the bettering of our realm: by the counsel of our venerable fathers Stephen archbishop of Canterbury, primate of all England and cardinal of the holy Roman church: of Henry archbishop of Dublin: of the bishops William of London, Peter of Winchester, Jocelin of Bath and Glastonbury, Hugo of Lincoln, Walter of Worcester, William of Coventry and Benedict of Rochester; of master Pandulf, subdeacon of the household of the lord pope; of brother Aymeric, master of the knights of the Temple in England; and of the noble men, William Marshall earl of Pembroke, William earl of Salisbury, William earl of Warren, William earl of Arundel, Alan de Galway constable of Scotland, Warin son of Gerod, Peter son of Herbert, Hubert de Burgh seneschal of Poitiers, Hugo de Neville, Matthew son of Herbert, Thomas Basset, Philip d'Aubigni, Robert de Roppelay, John Marshall, John son of Hugo, and others of our faithful subjects:

1. First of all have granted to God, and, for us and for our heirs forever, have confirmed, by this our present charter, that the English church shall be free and shall have its rights intact

and its liberties uninfringed upon. And thus we will that it be observed. As is apparent from the fact that we, spontaneously and of our own free will, before discord broke out between ourselves and our barons, did grant and by our charter confirm—and did cause the lord pope Innocent III to confirm—freedom of elections, which is considered most important and most necessary to the church of England. Which charter both we ourselves shall observe, and we will that it be observed with good faith by our heirs forever. We have also granted to all free men of our realm, on the part of ourselves and our heirs forever, all the subjoined liberties, to have and to hold, to them and to their heirs, from us and from our heirs:

2. If any one of our earls or barons, or of others holding from us in chief through military service, shall die; and if, at the time of his death, his heir be of full age and owe a relief: he shall have his inheritance by paying the old relief;—the heir, namely, or the heirs, of an earl, by paying one hundred pounds for the whole barony of an earl; the heir or heirs of a baron, by paying one hundred pounds for the whole barony; the heir or heirs of a knight, by paying one hundred shillings at most for a whole knight's fee; and he who shall owe less shall give less, according to the ancient custom of fees.

3. But if the heir of any of the above persons shall be under age and in wardship, when he comes of age he shall have his inheritance without relief and without fine.

4. The administrator of the land of such heir who shall be under age shall take none but reasonable issues from the land of the heir, and reasonable customs and services; and this without destruction and waste of men or goods. And if we shall have committed the custody of any such land to the sheriff or to any other man who ought to be responsible to us for the issues of it, and he cause destruction or waste to what is in his charge: we will fine him, and the land shall be handed over to two lawful and discreet men of that fee, who shall answer to us, or to him to whom we shall have referred them, regarding those issues. And if we shall have given or sold to any one the custody of any such land, and he shall have caused destruc-

tion or waste to it, he shall lose that custody, and it shall be given to two lawful and discreet men of that fee, who likewise shall answer to us, as has been explained.

5. The administrator, moreover, so long as he may have the custody of the land, shall keep in order, from the issues of that land, the houses, parks, warrens, lakes, mills, and other things pertaining to it. And he shall restore to the heir, when he comes to full age, his whole land stocked with plows and wainnages, according as the time of the wainnage requires and the issues of the land will reasonably permit.

6. Heirs may marry without disparagement; so, nevertheless, that, before the marriage is contracted, it shall be announced to the relations by blood of the heir himself.

7. A widow, after the death of her husband, shall straightway and without difficulty, have her marriage portion and her inheritance, nor shall she give anything in return for her dowry, her marriage portion, or the inheritance which belonged to her, and which she and her husband held on the day of the death of that husband. And she may remain in the house of her husband, after his death, for forty days; within which her dowry shall be paid over to her.

8. No widow shall be forced to marry when she prefers to live without a husband; so, however, that she gives security not to marry without our consent, if she holds from us, or the consent of the lord from whom she holds, if she holds from another.

9. Neither we nor our bailiffs shall cease any revenue for any debt, so long as the chattels of the debtor suffice to pay the debt; nor shall the sponsors of that debtor be distrained so long as that chief debtor has enough to pay the debt; not having the wherewithal to pay it, the sponsors shall answer for the debt. And, if they shall wish, they may have the lands and the revenues of the debtor until satisfaction shall have been given them for the debt previously paid for him; unless the chief debtor shall show that he is quit in that respect towards those same sponsors.

10. If any one shall have taken any sum, great or small, as

a loan from the Jews, and shall die before that debt is paid, that debt shall not bear interest so long as the heir, from whom-ever he may hold, shall be under age. And if the debt shall fall into our hands, we shall take nothing save the chattel contained in the deed.

11. And if any one dies owing a debt to the Jews, his wife shall have her dowry, and shall restore nothing of that debt. But if there shall remain children of that dead man, and they shall be under age, the necessities shall be provided for them according to the nature of the dead man's holding; and, from the residue, the debt shall be paid, saving the service due to the lords. In like manner shall be done concerning debts that are due to others besides Jews.

12. No scutage or aid shall be imposed in our realm unless by the common council of our realm; except for redeeming our body, and knighting our eldest son, and marrying, once, our eldest daughter. And for these purposes there shall only be given a reasonable aid. In like manner shall be done concerning the aids of the city of London.

13. And the city of London shall have all its old liberties and free customs as well by land as by water. Moreover, we will and grant that all other cities and boroughs, and towns and ports, shall have all their liberties and free customs.

14. And, in order to have the common council of the realm in the matter of assessing an aid otherwise than in the afore-said cases, or of assessing a scutage, we shall cause, under seal through our letters, the archbishops, bishops, abbots, earls, and the greater barons to be summoned for a fixed day—for a term, namely, at least forty days distant—and for a fixed place. And, moreover, we shall cause to be summoned in general through our sheriffs and bailiffs, all those who hold us in chief. And in those letters of summons we shall express the cause of the summons. And when a summons has thus been made, the business shall be proceeded with on the day appointed according to the council of those who shall be present, even though not all shall come who were summoned.

15. We will not allow any one henceforth to take an aid



from his freemen save for the redemption of his body, and the knighting of his eldest son, and the marrying, once, of his eldest daughter; and, for these purposes, there shall only be given a reasonable aid.

16. No one shall be forced to do more service for a knight's fee, or for another free holding, than is due from it.

17. Common pleas shall not follow our court, but shall be held in a certain fixed place.

18. Assizes of novel disseisin, of mort d'ancestor, and of darrein presentment shall not be held save in their own counties, and in this way: We, or our chief justice, if we shall be absent from the kingdom, shall send two justices through each county four times a year; they, with four knights from each county, chosen by the county, shall hold the aforesaid assizes in the county, and on the day and at the place of the county court.

19. And, if on the day of the county court the aforesaid assizes cannot be held, a sufficient number of knights and free tenants, from those who were present at the county court on that day, shall remain, so that through them the judgments may be suitably given, according as the matter may have been great or small.

20. A freeman shall only be amerced for a small offence according to the measure of that offence. And for a great offence he shall be amerced according to the magnitude of the offence, saving his contenement; and a merchant, in the same way, saving his merchandise. And a villein, in the same way, if he falls under our mercy shall be amerced saving his wainage. And none of the aforesaid fines shall be imposed save upon oath of upright men from the neighbourhood.

21. Earls and barons shall not be amerced save through their peers, and only according to the measure of the offence.

22. No clerk shall be amerced for his lay tenement except according to the manner of the other persons aforesaid; and not according to the amount of his ecclesiastical benefice.

23. Neither a town nor a man shall be forced to make

bridges over the rivers, with the exception of those who from of old and of right ought to do it.

24. No sheriff, constable, coroners, or other bailiffs of ours shall hold the pleas of our crown.

25. All counties, hundreds, wapentakes, and tithings—our demesne manors being excepted—shall continue according to the old farms, without any increase at all.

26. If any one holding from us a lay fee shall die, and our sheriff or bailiff can show our letters patent containing our summons for the debt which the dead man owed to us, our sheriff or bailiff may be allowed to attach and enroll the chattels of the dead man to the value of that debt, through view of lawful men; in such way, however, that nothing shall be removed thence until the debt is paid which was plainly owed to us. And the residue shall be left to the executors that they may carry out the will of the dead man. And if nothing is owed to us by him, all the chattels shall go to the use prescribed by the deceased, saving their reasonable portions to his wife and children.

27. If any freeman shall have died intestate, his chattels shall be distributed through the hands of his near relatives and friends, by view of the church; saving to any one the debts which the dead man owed him.

28. No constable or other bailiff of ours shall take the corn or other chattels of any one except he straightway give money for them, or can be allowed a respite in that regard by the will of the seller.

29. No constable shall force any knight to pay money for castleward if he be willing to perform that ward in person, or—he for a reasonable cause not being able to perform it himself—through another proper man. And if we shall have led or sent him on a military expedition, he shall be quit of ward according to the amount of time during which, through us, he shall have been in military service.

30. No sheriff nor bailiff of ours, nor any one else, shall take the horses or carts of any freeman for transport, unless by the will of that freeman.

31. Neither we nor our bailiffs shall take another's wood

for castles or for other private uses unless by the will of him to whom the wood belongs.

32. We shall not hold the lands of those convicted of felony longer than a year and a day; and then the lands shall be restored to the lords of the fiefs.

33. Henceforth all the weirs in the Thames and Medway, and throughout all England, save on the seacoast, shall be done away with entirely.

34. Henceforth the writ which is called *Præcipe* shall not be served on any one for any holding so as to cause a free man to lose his court.

35. There shall be one measure of wine throughout our whole realm, and one measure of ale and one measure of corn—namely, the London quart;—and one width of dyed and russet and hauberk cloths—namely, two ells below the selvage. And with weights, moreover, it shall be as with measures.

36. Henceforth nothing shall be given or taken for a writ of inquest in a matter concerning life or limb; but it shall be considered gratis, and shall not be denied.

37. If any one hold of us in fee-farm, or in socage, or in burkage, and hold land of another by military service, we shall not, by reason of that fee-farm, or socage, or burkage, have the wardship of his heir or of his land which is held in fee from another. Nor shall we have the wardship of that fee-farm, or socage, or burkage unless that fee-farm owe military service. We shall not, by reason of some petit-sergeanty which some one holds of us through the service of giving us knives or arrows or the like, have the wardship of his heir or of the land which he holds of another by military service.

38. No bailiff, on his own simple assertion, shall henceforth put any one to his law, without producing faithful witnesses in evidence.

39. No freeman shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed—nor will we go upon or send upon him—save by the lawful judgment of his peers or by the law of the land.

40. To none will we sell, to none deny or delay, right or justice.

41. All merchants may safely and securely go out of England, and come into England, and delay and pass through England, as well by land as by water, for the purpose of buying and selling, free from all evil taxes, subject to the ancient and right customs—save in time of war, and if they are of the land at war against us. And if such be found in our land at the beginning of the war, they shall be held, without harm to their bodies and goods, until it shall be known to us or to our chief justice how the merchants of our land are to be treated who shall, at that time, be found in the land at war against us. And if ours shall be safe there, the others shall be safe in our land.

42. Henceforth any person, saving fealty to us, may go out of our realm and return to it, safely and securely, by land and by water, except perhaps for a brief period in time of war, for the common good of the realm. But prisoners and outlaws are excepted according to the law of the realm; also people of a land at war against us, and the merchants, with regard to whom shall be done as we have said.

43. If any one hold from any escheat—as from the honour of Wallingford, Nottingham, Boloin, Lancaster, or the other escheats which are in our hands and are baronies—and shall die, his heir shall not give another relief, nor shall he perform for us other service than he would perform for a baron if that barony were in the hand of a baron; and we shall hold it in the same way in which the baron has held it.

44. Persons dwelling without the forest shall not henceforth come before the forest justices, through common summonses, unless they are impleaded or are the sponsors of some person or persons attached for matters concerning the forest.

45. We will not make men justices, constables, sheriffs, or bailiffs, unless they are such as know the law of the realm, and are minded to observe it rightly.

46. All barons who have founded abbeys for which they have charters of the kings of England, or ancient right of

tenure, shall have, as they ought to have, their custody when vacant.

47. All forests constituted as such in our time shall straightway be annulled; and the same shall be done for river banks made into places of defence by us in our time.

48. All evil customs concerning forests and warrens, and concerning foresters and warreners, sheriffs and their servants, river banks and their guardians shall straightway be inquired into in each county, through twelve sworn knights from that county, and shall be eradicated by them, entirely, so that they shall never be renewed, within forty days after the inquest has been made; in such manner that we shall first know about them, or our justice if we be not in England.

49. We shall straightway return all hostages and charters which were delivered to us by Englishmen as a surety for peace or faithful service.

50. We shall entirely remove from their bailiwicks the relatives of Gerard de Athyes, so that they shall henceforth have no bailiwick in England: Engelard de Cygnes, Geoffrey de Martin and his brothers, Philip Mark and his brothers, and Geoffrey his nephew, and the whole following of them.

51. And straightway after peace is restored we shall remove from the realm all the foreign soldiers, cross-bowmen, servants, hirelings, who may have come with horses and arms to the harm of the realm.

52. If any one shall have been disseized by us, or removed, without a legal sentence of his peers, from his lands, castles, liberties or lawful right, we shall straightway restore them to him. If a dispute shall arise concerning this matter it shall be settled according to the judgment of the twenty-five barons who are mentioned below as sureties for the peace. But with regard to all those things of which any one was, by king Henry our father or king Richard our brother, disseized or dispossessed without legal judgment of his peers, which we have in our hand or which others hold, and for which we ought to give a guarantee: we shall have respite until the common term for crusaders. Except with regard to those concerning which a plea



was moved, or an inquest made by our order, before we took the cross. But when we return from our pilgrimage, or if, by chance, we desist from our pilgrimage, we shall straightway then show full justice regarding them.

53. We shall have the same respite, moreover, and in the same manner, in the matter of showing justice with regard to forests to be annulled and forests to remain, which Henry our father or Richard our brother constituted; and in the matter of wardships of lands which belong to the fee of another—wardships of which kind we have hitherto enjoyed by reason of the fee which some one held from us in military service;—and in the matter of abbeys founded in the fee of another than ourselves—in which the lord of the fee may say that he has jurisdiction. And when we return, or if we desist from our pilgrimage, we shall straightway exhibit full justice to those complaining with regard to these matters.

54. No one shall be taken or imprisoned on account of the appeal of a woman concerning the death of another than her husband.

55. All fines imposed by us unjustly and contrary to the law of the land, and all amerciements made unjustly and contrary to the law of the land, shall be altogether remitted, or it shall be done with regard to them according to the judgment of the twenty-five barons mentioned below as sureties for the peace, or according to the judgment of the majority of them together with the aforesaid Stephen archbishop of Canterbury, if he can be present, and with others whom he may wish to associate with himself for this purpose. And if he cannot be present, the affair shall nevertheless proceed without him; in such way that, if one or more of the said twenty-five barons shall be concerned in a similar complaint, they shall be removed as to this particular decision, and, in their place, for this purpose alone, others shall be substituted who shall be chosen and sworn by the remainder of those twenty-five.

56. If we have disseized or dispossessed Welshmen of their lands or liberties or other things without legal judgment of their peers, in England or in Wales, they shall straightway be re-



stored to them. And if a dispute shall arise concerning this, then action shall be taken upon it in the March through judgment of their peers—concerning English holdings according to the law of England, concerning Welsh holdings according to the law of Wales, concerning holdings in the March according to the law of the March. The Welsh shall do likewise with regard to us and our subjects.

57. But with regard to all those things of which any one of the Welsh was, by king Henry our father or king Richard our brother, disseized or dispossessed without legal judgment of his peers, which we have in our hand or which others hold, and for which we ought to give a guarantee: we shall have respite until the common term for crusaders. Except with regard to those concerning which a plea was moved, or an inquest made by our order, before we took the cross. But when we return from our pilgrimage, or if, by chance, we desist from our pilgrimage, we shall straightway then show full justice regarding them, according to the laws of Wales and the aforesaid districts.

58. We shall straightway return the son of Llewelin and all the Welsh hostages, and the charters delivered to us as surety for the peace.

59. We shall act towards Alexander king of the Scots regarding the restoration of his sisters, and his hostages, and his liberties and his lawful right, as we shall act towards our other barons of England; unless it ought to be otherwise according to the charters which we hold from William, his father, the former king of the Scots. And this shall be done through judgment of his peers in our court.

60. Moreover, all the subjects of our realm, clergy as well as laity, shall, as far as pertains to them, observe, with regard to their vassals, all these aforesaid customs and liberties which we have decreed shall, as far as pertains to us, be observed in our realm with regard to our own.

61. Inasmuch as, for the sake of God, and for the bettering of our realm, and for the more ready healing of the discord which has arisen between us and our barons, we have made all these aforesaid concessions—wishing them to enjoy for ever

entire and firm stability, we make and grant to them the following security: that the barons, namely, may elect at their pleasure twenty-five barons from the realm, who ought, with all their strength, to observe, maintain and cause to be observed, the peace and privileges which we have granted to them and confirmed by this, our present charter. In such wise, namely, that if we, or our justice, or our bailiffs, or any one of our servants shall have transgressed against any one in any respect, or shall have broken some one of the articles of peace or security, and our transgression shall have been shown to four barons of the aforesaid twenty-five: those four barons shall come to us, or, if we are abroad, to our justice, showing to us our error; and they shall ask us to cause that error to be amended without delay. And if we do not amend that error, or, we being abroad, if our justice do not amend it within a term of forty days from the time when it was shown to us or, we being abroad, to our justice: the aforesaid four barons shall refer the matter to the remainder of the twenty-five barons, and those twenty-five barons, with the whole land in common, shall distrain and oppress us in every way in their power—namely, by taking our castles, lands and possessions, and in every other way that they can, until amends shall have been made according to their judgment. Saving the persons of ourselves, our queen and our children. And when amends shall have been made they shall be in accord with us as they had been previously. And whoever of the land wishes to do so, shall swear that in carrying out all the aforesaid measures he will obey the mandates of the aforesaid twenty-five barons, and that, with them, he will oppress us to the extent of his power. And, to any one who wishes to do so, we publicly and freely give permission to swear, and we will never prevent any one from swearing. Moreover, all those in the land who shall be unwilling, themselves and of their own accord, to swear to the twenty-five barons as to distraining and oppressing us with them: such ones we shall make to swear by our mandate, as has been said. And if any one of the twenty-five barons shall die, or leave the country, or in any other way be prevented from carrying out the aforesaid meas-

ures, the remainder of the aforesaid twenty-five barons shall choose another in his place, according to their judgment, who shall be sworn in the same way as the others. Moreover, in all things entrusted to those twenty-five barons to be carried out, if those twenty-five shall be present and chance to disagree among themselves with regard to some matter, or if some of them, having been summoned, shall be unwilling or unable to be present: that which the majority of those present shall decide or decree shall be considered binding and valid, just as if all the twenty-five had consented to it. And the aforesaid twenty-five shall swear that they will faithfully observe all the foregoing, and will cause them to be observed to the extent of their power. And we shall obtain nothing from any one, either through ourselves or through another, by which any of those concessions and liberties may be revoked or diminished. And if any such thing shall have been obtained, it shall be vain and invalid, and we shall never make use of it, either through ourselves or through another.

62. And we have fully remitted to all, and pardoned, all the ill-will, anger and rancour which have arisen between us and our subjects, clergy and laity, from the time of the struggle. Moreover, we have fully remitted to all, clergy and laity, and—as far as pertains to us—have pardoned fully all the transgressions committed, on the occasion of that same struggle, from Easter of the sixteenth year of our reign until the re-establishment of peace. In witness of which, moreover, we have caused to be drawn up for them letters patent of lord Stephen archbishop of Canterbury, lord Henry archbishop of Dublin, and the aforesaid bishops and master Pandulf, regarding that surety and the aforesaid concessions.

63. Wherefore we will and firmly decree that the English church shall be free, and that the subjects of our realm shall have and hold all the aforesaid liberties, rights and concessions, duly and in peace, freely and quietly, fully and entirely, for themselves and their heirs, from us and our heirs, in all matters and in all places, forever, as has been said. Moreover, it has been sworn, on our part as well as on the part of the barons,

that all these above-mentioned provisions shall be observed with good faith and without evil intent. The witnesses being the above-mentioned and many others. Given through our hand, in the plain called Runnymede, between Windsor and Stanes, on the fifteenth day of June, in the seventeenth year of our reign.\*

Earl of Clare. <sup>1</sup>	Mayor of London.
Earl of Albemarle.	Gilbert de Laval.
Earl of Gloucester.	Robert de Roos.
Earl of Winchester.	Constable of Chester.
Earl of Hereford.	Richard Perey.
Earl Roger.	John Fitz-Robert.
Earl Robert.	William Malet.
William Marshall the younger.	Geoffrey de Say.
Robert Fitz-Walter the elder.	Roger de Mowbray.
Gilbert de Clare.	William of Huntingfield.
Eustace de Vesey.	Richard de Montfichet.
Hugh Bigod.	William de Albeney.
William Mersbray.	

\* From "Select Historical Documents of the Middle Ages," as translated from "Stubbs's Charters" by Ernest F. Henderson, A.B. (Trinity College, Conn.), A.M. (Harvard), Ph.D. (Berlin).

<sup>1</sup>The translation of the names of the signers of the Magna Charta is taken from "Roger of Wendover's Flowers of History," Vol. II, page 323.

APPENDIX II  
CONSTITUTION OF JAPAN





## PREAMBLE

### OF THE CONSTITUTION OF JAPAN

**H**AVING, by virtue of the glories of Our Ancestors, ascended the Throne of a lineal succession unbroken for ages eternal; desiring to promote the welfare of, and to give development to, the moral and intellectual faculties of Our beloved subjects, the very same that have been favored with the benevolent care and affectionate vigilance of Our Ancestors, and hoping to maintain the prosperity of the State, in concert with Our people and with their support, We hereby promulgate, in pursuance of Our Imperial Rescript of the 12th day of the 10th month of the 14th year of Meiji, a fundamental law of State, to exhibit the principles by which We are to be guided in Our conduct, and to point out to what Our descendants and Our subjects and their descendants are forever to conform.

The rights of sovereignty of the State We have inherited from Our Ancestors, and We shall bequeath them to Our descendants. Neither We nor they shall in future fail to wield them, in accordance hereby granted.

We now declare to respect and protect the security of the rights and of the property of Our people, and to secure to them the complete enjoyment of the same, within the extent of the provisions of the present Constitution and of the law.

The Imperial Diet shall first be convoked for the twenty-third year of Meiji, and the time of its opening shall be the date when the present Constitution comes into force.

When in the future it may become necessary to amend any of the provisions of the present Constitution, We or Our successors shall assume the initiative right, and submit a project

for the same to the Imperial Diet. The Imperial Diet shall pass its vote upon it, according to the conditions imposed by the present Constitution, and in no other wise shall Our descendants or Our subjects be permitted to attempt any alteration thereof.

Our Ministers of State, on Our behalf, shall be held responsible for the carrying out of the present Constitution, and Our present and future subjects shall forever assume the duty of allegiance to the present Constitution.<sup>1</sup>

(His Imperial Majesty's Sign Manual.)

(Privy Seal.)

The 11th day of the 2nd month of the 22nd year of Meiji.

(Countersigned.)

COUNT KIYOTAKA KURODA, Minister President of State.

COUNT HIROBUMI ITO, President of the Privy Council.

COUNT SHIGENOBU OKUMA, Minister of State for Foreign Affairs.

COUNT TSUKUMICHI SAIGO, Minister of State for the Navy.

COUNT KAORU INOUE, Minister of State for Agriculture and Commerce.

COUNT AKIYOSHI YAMADA, Minister of State for Justice.

COUNT MASAYOSHI MATSUGATA, Minister of State for Finance and Minister of State for Home Affairs.

COUNT IWAO OYAMA, Minister of State for War.

VISCOUNT ARINORI MORI, Minister of State for Education.

VISCOUNT TAKEAKI ENOMOTO, Minister of State for Communications.

<sup>1</sup>From Hirobumi Ito's "Commentaries of the Imperial Constitution," by Miyoji Ito.

# CONSTITUTION OF JAPAN

## CHAPTER I

### EMPEROR

**A**RTICLE I.—The Empire of Japan shall be reigned over and governed by a line of Emperors unbroken for ages eternal.

Article II.—The Imperial Throne shall be succeeded to by Imperial male descendants, according to the provisions of the Imperial House Law.

Article III.—The Emperor is sacred and inviolable.

Article IV.—The Emperor is the head of the Empire, combining in himself the rights of sovereignty, and exercises them according to the provisions of the present Constitution.

Article V.—The Emperor exercises the legislative power with the consent of the Imperial Diet.

Article VI.—The Emperor gives sanction to laws, and orders them to be promulgated and executed.

Article VII.—The Emperor convokes the Imperial Diet, opens, closes, and prorogues it, and dissolves the House of Representatives.

Article VIII.—The Emperor, in consequence of an urgent necessity to maintain public safety or to avert the public calamities, issues, when the Imperial Diet is not sitting, Imperial ordinances in the place of law. Such Imperial Ordinances are to be laid before the Imperial Diet at its next session, and when the Diet does not approve the said Ordinances, the Government shall declare them to be invalid for the future.

Article IX.—The Emperor issues, or causes to be issued,

the Ordinances necessary for the carrying out of the laws, or for the maintenance of the public peace and order, and for the promotion of the welfare of the subjects. But no Ordinance shall in any way alter any of the existing laws.

Article X.—The Emperor determines the organization of the different branches of the administration and the salaries of all civil and military officers, and appoints and dismisses the same. Exceptions especially provided for in the present Constitution or in other laws shall be in accordance with the respective provisions (bearing thereon).

Article XI.—The Emperor has the supreme command of the army and navy.

Article XII.—The Emperor determines the organization and peace standing of the army and navy.

Article XIII.—The Emperor declares war, makes peace, and concludes treaties.

Article XIV.—The Emperor proclaims the law of siege.

The conditions and effects of the law of siege shall be determined by law.

Article XV.—The Emperor confers title of nobility, rank, orders, and other marks of honor.

Article XVI.—The Emperor orders amnesty, pardon, commutation, or punishments and rehabilitation.

Article XVII.—A Regency shall be instituted in conformity with the provisions of the Imperial House Law.

Regent shall exercise the powers appertaining to the Emperor in his name.

## CHAPTER II

### RIGHTS AND DUTIES OF SUBJECTS

Article XVIII.—The conditions necessary for being a Japanese subject shall be determined by law.

Article XIX.—Japanese subjects may, according to qualifications determined in laws or ordinances, be appointed to civil or military offices equally, and may fill any other public offices.

Article XX.—Japanese subjects are amenable to service in the army or navy, according to the provisions of law.

Article XXI.—Japanese subjects are amenable to the duty of paying taxes, according to the provisions of law.

Article XXII.—Japanese subjects shall have the liberty of abode and of changing the same within the limits of law.

Article XXIII.—No Japanese subjects shall be arrested, detained, tried, or punished, unless according to law.

Article XXIV.—No Japanese subject shall be deprived of his right of being tried by the judges determined by law.

Article XXV.—Except in the cases provided for in the law, the house of no Japanese subject shall be entered or searched without his consent.

Article XXVI.—Except in the cases mentioned in the law, the secrecy of the letters of every Japanese subject shall remain inviolate.

Article XXVII.—The right of property of every Japanese subject shall remain inviolate.

Measures necessary to be taken for the public benefit shall be provided for by law.

Article XXVIII.—Japanese subjects shall, within limits not prejudicial to peace and order and not antagonistic to their duties as subjects, enjoy freedom of religious belief.

Article XXIX.—Japanese subjects shall, within the limits of law, enjoy the liberty of speech, writing, publication, public meeting and association.

Article XXX.—Japanese subjects may present petitions by observing the proper form of respect and by complying with the rules specially provided for the same.

Article XXXI.—The provisions contained in the present chapter shall not affect the exercise of the powers appertaining to the Emperor in times of war or in cases of a national emergency.

Article XXXII.—Each and every one of the provisions contained in the preceding articles of the present chapter, that are not in conflict with the laws or the rules and discipline of the

army and navy, shall apply to the officers and men of the army and navy.

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## CHAPTER III

### THE IMPERIAL DIET

Article XXXIII.—The Imperial Diet shall consist of two Houses, a House of Peers and a House of Representatives.

Article XXXIV.—The House of Peers shall, in accordance with the ordinance concerning the House of Peers, be composed of the members of the Imperial Family, of the orders of nobility, and of those persons who have been nominated thereto by the Emperor.

Article XXXV.—The House of Representatives shall be composed of members elected by the people, according to the provisions of the Law of Election.

Article XXXVI.—No one can at one and the same time be a member of both Houses.

Article XXXVII.—Every law requires the consent of the Imperial Diet.

Article XXXVIII.—Both Houses shall vote upon projects of law submitted to them by Government, and may respectively initiate projects of law.

Article XXXIX.—A bill which has been rejected by either the one or the other of the two Houses shall not be again brought in during the same session.

Article XL.—Both Houses can make representations to the Government as to laws or upon any other subject. When, however, such representations are not accepted, they cannot be made a second time during the same session.

Article XLI.—The Imperial Diet shall be convoked every year.

Article XLII.—A session of the Imperial Diet shall last during three months. In case of necessity the duration of a session may be prolonged by Imperial order.



Article XLIII.—When urgent necessity arises, an extraordinary session may be convoked, in addition to the ordinary one.

Duration of an extraordinary session shall be determined by Imperial order.

Article XLIV.—The opening, closing, prolongation of the Imperial Diet shall be effected simultaneously for both Houses.

In case the House of Representatives has been ordered to dissolve, the House of Peers shall at the same time be prorogued.

Article XLV.—When the House of Representatives has been ordered to dissolve, members shall be caused by Imperial orders to be newly elected, and the new House shall be convoked within five months from the day of dissolution.

Article XLVI.—No debate can be opened and no vote can be taken in either House of the Imperial Diet unless not less than one-third of the whole number of the members thereof is present.

Article XLVII.—Votes shall be taken in both Houses by absolute majority. In the case of a tie vote the President shall have the casting vote.

Article XLVIII.—The deliberations of both Houses shall be held in public. The deliberations may, however, upon demand of the Government or by resolution of the House, be held in secret sitting.

Article XLIX.—Both Houses of the Imperial Diet may respectively present addresses to the Emperor.

Article L.—Both Houses may receive petitions presented by subjects.

Article LI.—Both Houses may enact, besides what is provided for in the present Constitution and in the law of the Houses, rules necessary for the management of their internal affairs.

Article LII.—No member of either House shall be held responsible outside the respective Houses for any opinion uttered or for any vote given in the House. When, however, a member himself has given publicity to his opinions by public speech, by documents in print or in writing, or by any other similar means, he shall, in the matter, be amenable to the general law.

Article LIII.—The members of both Houses shall, during the session, be free from arrest, unless with the consent of the House, except in cases of flagrant delicts, or of offenses connected with a state of internal commotion or with a foreign trouble.

Article LIV.—The Ministers of State and the Delegates of the Government may, at any time, take seats and speak in either House.

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## CHAPTER IV

### MINISTERS OF STATE AND THE PRIVY COUNCIL

Article LV.—The respective Ministers of State shall give their advice to the Emperor, and be responsible for it.

All Laws, Imperial Ordinances, and Imperial Rescripts, of whatever kind, that relate to the affairs of the State, require the counter-signature of a Minister of State.

Article LVI.—The Privy Council shall, in accordance with the provisions for the organization of the Privy Council, deliberate upon important matters of State when they have been consulted by the Emperor.

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## CHAPTER V

### JUDICATURE

Article LVII.—The Judicature shall be exercised by the Courts of Law, according to law, in the name of the Emperor.

The organization of the Courts of Law shall be determined by law.

Article LVIII.—The judges shall be appointed from among those who possess proper qualifications according to law.

No judge shall be deprived of his position unless by way of criminal sentence or disciplinary punishment.

Article LIX.—Trials and judgments of a Court shall be conducted publicly. When, however, there exists any fear that such publicity may be prejudicial to peace and order, or to the maintenance of public morality, the public trial may be suspended by provision of law or by the decision of the Court of Law.

Article LX.—All matters that fall within the competency of a special Court shall be especially provided for by law.

Article LXI.—No suit at law which relates to rights alleged to have been infringed by the illegal measures of the executive authorities, and which shall come within the competency of the Court of Administrative Litigation especially established by law, shall be taken cognizance of by a Court of Law.

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## CHAPTER VI

### FINANCE

Article LXII.—The imposition of a new tax or the modification of the rates (of an existing one) shall be determined by law.

However, all such administrative fees or other revenue having the nature of compensation shall not fall within the category of the above clause.

The raising of national loans and the contracting of other liabilities to the charge of the National Treasury, except those that are provided in the Budget, shall require the consent of the Imperial Diet.

Article LXIII.—The taxes levied at present shall, in so far as are not remodeled by new law, be collected according to the old system.

Article LXIV.—The expenditure and revenue of the State

require the consent of the Imperial Diet by means of an annual Budget.

Any and all expenditures overpassing the appropriations set forth in the Titles and Paragraphs of the Budget, or that are not provided for in the Budget, shall subsequently require the approbation of the Imperial Diet.

Article LXV.—The Budget shall be first laid before the House of Representatives.

Article LXVI.—The expenditures of the Imperial House shall be defrayed every year out of the National Treasury, according to the present fixed amount for the same, and shall not require the consent thereto of the Imperial Diet, except in case an increase thereof is found necessary.

Article LXVII.—Those already fixed expenditures based by the Constitution upon the powers appertaining to the Emperor, and such expenditures as may have arisen by the effect of law, or that appertain to the legal obligations of the Government, shall be neither rejected nor reduced by the Imperial Diet without the concurrence of the Government.

Article LXVIII.—In order to meet special requirements, the Government may ask the consent of the Imperial Diet to a certain amount as a Continuing Expenditure Fund for a previously fixed number of years.

Article LXIX.—In order to supply deficiencies, which are unavoidable, in the Budget, and to meet requirements unprovided for in the same, a Reserve Fund shall be provided in the Budget.

Article LXX.—When the Imperial Diet cannot be convoked, owing to the external or internal condition of the country, in case of urgent need for the maintenance of public safety the Government may take all necessary financial measures by means of an Imperial Ordinance.

In the case mentioned in the preceding clause the matter shall be submitted to the Imperial Diet at its next session, and its approbation shall be obtained thereto.

Article LXXI.—When the Imperial Diet has not voted on the Budget, or when the Budget has not been brought into actual

existence, the Government shall carry out the Budget of the preceding year.

Article LXXII.—The final account of the expenditures and revenue of the State shall be verified and confirmed by the Board of Audit, and it shall be submitted by the Government to the Imperial Diet, together with the report of verification of the said Board.

The organization and competency of the Board of Audit shall be determined by law separately.

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## CHAPTER VII

### SUPPLEMENTARY RULES

Article LXXIII.—When it has become necessary in future to amend the provisions of the present Constitution, a project to that effect shall be submitted to the Imperial Diet by Imperial order.

In the above case, neither House can open the debate unless at least two-thirds of the whole number of members are present, and no amendment can be passed unless a majority of at least two-thirds of the members present is obtained.

Article LXXIV.—No modification of the Imperial House Law shall be required to be submitted to the deliberation of the Imperial Diet.

No provision of the present Constitution can be modified by the Imperial House Law.

Article LXXV.—No modification can be introduced into the Constitution or into the Imperial House Law during the time of Regency.

Article LXXVI.—Existing legal enactments, such as laws, regulations, ordinances, or by whatever names they may be called, shall, so far as they do not conflict with the present Constitution, continue in force.

All existing contracts or orders that entail obligations upon the Government, and that are connected with expenditure, shall come within the scope of Article LXVII.





APPENDIX III

THE DECLARATION OF INDEPENDENCE

AND

ARTICLES OF CONFEDERATION



## THE DECLARATION OF INDEPENDENCE

(Adopted in Congress, July 4, 1776.)

**W**HEN, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness. That, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles and organizing its powers in such form as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and, accordingly, all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government and to provide new guards for their future security. Such has

been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these States. To prove this, let facts be submitted to a candid world.

He has refused his assent to laws the most wholesome and necessary for the public good.

He has forbidden his Governors to pass laws of immediate and pressing importance, unless suspended in their operation till his assent should be obtained; and when so suspended he has utterly neglected to attend to them.

He has refused to pass other laws for the accommodation of large districts of people, unless those people would relinquish the right of representation in the Legislature—a right inestimable to them, and formidable to tyrants only.

He has called together legislative bodies at places unusual, uncomfortable, and distant from the depository of their public records, for the sole purpose of fatiguing them into compliance with his measures.

He has dissolved representative houses repeatedly for opposing, with manly firmness, his invasions on the rights of the people.

He has refused, for a long time after such dissolution, to cause others to be elected; whereby the legislative powers, incapable of annihilation, have returned to the people at large for their exercise; the State remaining, in the meantime, exposed to all the dangers of invasion from without and convulsions within.

He has endeavored to prevent the population of these States; for that purpose obstructing the laws for naturalization of foreigners; refusing to pass others to encourage their migrations hither, and raising the conditions of new appropriations of lands.

He has obstructed the administration of justice by refusing his assent to laws for establishing judiciary powers.

He has made judges dependent on his will alone for the tenure of their offices and the amount and payment of their salaries.

He has erected a multitude of new offices, and sent hither swarms of officers to harass our people and eat out their substance.

He has kept among us, in times of peace, standing armies, without the consent of our Legislatures.

He has affected to render the military independent of, and superior to, the civil power.

He has combined with others to subject us to a jurisdiction foreign to our Constitution and unacknowledged by our laws, giving his assent to their acts of pretended legislation :

For quartering large bodies of armed troops among us.

For protecting them, by a mock trial, from punishment for any murders which they should commit on the inhabitants of these States.

For cutting off our trade with all parts of the world.

For imposing taxes on us without our consent.

For depriving us, in many cases, of the benefits of trial by jury.

For transporting us beyond seas to be tried for pretended offenses.

For abolishing the free system of English laws in a neighboring province, establishing therein an arbitrary government, and enlarging its boundaries, so as to render it at once an example and fit instrument for introducing the same absolute rule into these colonies.

For taking away our charters, abolishing our most valuable laws, and altering, fundamentally, the forms of our governments.

For suspending our own Legislatures, and declaring themselves invested with power to legislate for us in all cases whatsoever.

He has abdicated government here by declaring us out of his protection and waging war against us.

He has plundered our seas, ravaged our coasts, burned our towns, and destroyed the lives of our people.

He is at this time transporting large armies of foreign mercenaries to complete the works of death, desolation, and tyranny, already begun, with circumstances of cruelty and perfidy scarcely paralleled in the most barbarous ages, and totally unworthy the head of a civilized nation.

He has constrained our fellow-citizens, taken captive on the high seas, to bear arms against their country, to become the executioners of their friends and brethren, or to fall themselves by their hands.

He has excited domestic insurrections among us, and has endeavored to bring on the inhabitants of our frontiers the merciless Indian savages, whose known rule of warfare is an undistinguished destruction of all ages, sexes, and conditions.

In every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince whose character is thus marked by every act which may define a tyrant is unfit to be the ruler of a free people.

Nor have we been wanting in attentions to our British brethren. We have warned them, from time to time, of attempts by their Legislature to extend an unwarrantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity, and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation and hold them as we hold the rest of mankind—enemies in war; in peace, friends.

We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these



colonies, solemnly publish and declare that these united colonies are, and of right ought to be, free and independent States; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent States, they have full power to levy war, conclude peace, contract alliances, establish commerce, and to do all other acts and things which independent States may of right do. And for the support of this Declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

## NEW HAMPSHIRE.

Josiah Bartlett.  
William Whipple.  
Matthew Thornton.

## MASSACHUSETTS BAY.

Samuel Adams.  
John Adams.  
Robert Treat Paine.  
Elbridge Gerry.  
John Hancock.

## RHODE ISLAND.

Stephen Hopkins.  
William Ellery.

## CONNECTICUT.

Roger Sherman.  
Samuel Huntington.  
William Williams.  
Oliver Wolcott.

## NEW YORK.

William Floyd.  
Philip Livingston.  
Francis Lewis.  
Lewis Morris.

## NEW JERSEY.

Richard Stockton.  
John Witherspoon.  
Francis Hopkinson.  
John Hart.  
Abraham Clark.

## PENNSYLVANIA.

Robert Morris.  
Benjamin Rush.  
Benjamin Franklin.  
John Morton.  
George Clymer.  
James Smith.  
George Taylor.  
James Wilson.  
George Ross.

## DELAWARE.

Cæsar Rodney.  
George Read.  
Thomas M'Kean.

MARYLAND.

Samuel Chase.  
William Paca.  
Thomas Stone.  
Charles Carroll of Carrollton.

VIRGINIA.

George Wythe.  
Richard Henry Lee.  
Thomas Jefferson.  
Benjamin Harrison.  
Thomas Nelson, Jr.  
Francis Lightfoot Lee.  
Carter Braxton.

NORTH CAROLINA.

William Hooper.  
Joseph Hewes.  
John Penn.

SOUTH CAROLINA.

Edward Rutledge.  
Thomas Heyward, Jr.  
Thomas Lynch, Jr.  
Arthur Middleton.

GEORGIA.

Button Gwinnett.  
Lyman Hall.  
George Walton.

## ARTICLES OF CONFEDERATION

*To all to whom these presents shall come, we, the undersigned  
Delegates of the States affixed to our names, send greeting:*

Whereas, The Delegates of the United States of America, in Congress assembled, did, on the 15th day of November, in the year of our Lord, 1777, and in the second year of the Independence of America, agree to certain Articles of Confederation and perpetual union between the States of New Hampshire, Massachusetts Bay, Rhode Island and Providence Plantations, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, Virginia, North Carolina, South Carolina, and Georgia, in the words following, viz.:

ARTICLES OF CONFEDERATION AND PERPETUAL UNION BETWEEN  
THE STATES OF NEW HAMPSHIRE, MASSACHUSETTS BAY,  
RHODE ISLAND AND PROVIDENCE PLANTATIONS, CONNECTI-  
CUT, NEW YORK, NEW JERSEY, PENNSYLVANIA, DELAWARE,  
MARYLAND, VIRGINIA, NORTH CAROLINA, SOUTH CAROLINA,  
AND GEORGIA.

Article I.—The style of this Confederacy shall be “The United States of America.”

Article II.—Each State retains its sovereignty, freedom and independence, and every power, jurisdiction, and right which is not by this Confederation expressly delegated to the United States, in Congress assembled.

Article III.—The said States hereby severally enter into a firm league of friendship with each other for their common defense, the security of their liberties, and their mutual and general welfare; binding themselves to assist each other against all force offered to, or attacks made upon them, or any of them, on

account of religion, sovereignty, trade, or any other pretense whatever.

Article IV.—The better to secure and perpetuate mutual friendship and intercourse among the people of the different States of this Union, the free inhabitants of each of these States, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all privileges and immunities of free citizens in the several States; and the people of each State shall have free ingress and egress to and from any other State, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions and restrictions as the inhabitants thereof respectively; *provided*, that such restrictions shall not extend so far as to prevent the removal of property imported into any State to any other State of which the owner is an inhabitant; *provided also*, that no imposition, duties or restriction shall be laid by any State on the property of the United States, or either of them.

If any person guilty of or charged with treason, felony, or other high misdemeanor in any State, shall flee from justice, and be found in any of the United States, he shall, upon demand of the Governor or executive power of the State from which he fled, be delivered up and removed to the State having jurisdiction of his offense.

Full faith and credit shall be given in each of these States to the records, acts and judicial proceedings of the courts and magistrates of every other State.

Article V.—For the more convenient management of the general interests of the United States, delegates shall be annually appointed, in such manner as the Legislature of each State shall direct, to meet in Congress, on the first Monday in November in every year, with a power reserved to each State to recall its delegates, or any of them, at any time within the year, and to send others in their stead for the remainder of the year.

No State shall be represented in Congress by less than two nor by more than seven members; and no person shall be capable of being a delegate for more than three years in any term of

six years; nor shall any person, being a delegate, be capable of holding any office under the United States for which he, or another for his benefit, receives any salary, fees or emolument of any kind.

Each State shall maintain its own delegates in a meeting of the States, and while they act as members of the committee of the States.

In determining questions in the United States, in Congress assembled, each State shall have one vote.

Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress; the members of Congress shall be protected in their persons from arrests and imprisonments during the time of their going to and from and attendance on Congress, except for treason, felony, or breach of the peace.

Article VI.—No State, without the consent of the United States, in Congress assembled, shall send any embassy to, or receive any embassy from, or enter into any conference, agreement, alliance, or treaty with any king, prince, or state; nor shall any person holding any office of profit or trust under the United States, or any of them, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state; nor shall the United States, in Congress assembled, or any of them, grant any title of nobility.

No two or more States shall enter into any treaty, confederation, or alliance whatever between them without the consent of the United States, in Congress assembled, specifying accurately the purposes for which the same is to be entered into and how long it shall continue.

No State shall lay any imposts or duties, which may interfere with any stipulations in treaties entered into by the United States, in Congress assembled, with any king, prince, or state, in pursuance of any treaties already proposed by Congress to the courts of France and Spain.

No vessels of war shall be kept in time of peace by any State, except such number only as shall be deemed necessary by the United States, in Congress assembled, for the defense of such

State or its trade; nor shall any body of forces be kept up by any State, in time of peace, except such number only as in the judgment of the United States, in Congress assembled, shall be deemed requisite to garrison the forts necessary for the defense of such State; but every State shall always keep up a well-regulated and disciplined militia, sufficiently armed and accoutered, and shall provide and have constantly ready for use, in public stores, a due number of field pieces and tents, and a proper quantity of arms, ammunition, and camp equipage.

No State shall engage in any war without the consent of the United States, in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States, in Congress assembled, can be consulted; nor shall any State grant commissions to any ships or vessels of war, nor letters of marque or reprisal, except it be after a declaration of war by the United States, in Congress assembled; and then only against the kingdom or state, and the subjects thereof, against which war has been so declared, and under such regulations as shall be established by the United States, in Congress assembled, unless such State be infested by pirates, in which case vessels of war may be fitted out for that occasion, and kept so long as the danger shall continue, or until the United States, in Congress assembled, shall determine otherwise.

Article VII.—When land forces are raised by any State for the common defense, all officers of or under the rank of colonel shall be appointed by the Legislature of each State, respectively, by whom such forces shall be raised, or in such manner as such State shall direct, and all vacancies shall be filled up by the State which first made the appointment.

Article VIII.—All charges of war and all other expenses which shall be incurred for the common defense or general welfare, and allowed by the United States, in Congress assembled, shall be defrayed out of a common Treasury, which shall be supplied by the several States, in proportion to the value of all



land within each State, granted to or surveyed, for any person, as such land and the buildings and improvements thereon shall be estimated according to such mode as the United States, in Congress assembled, shall from time to time direct and appoint. The taxes for paying that proportion shall be laid and levied by the authority and direction of the Legislatures of the several States within the time agreed upon by the United States, in Congress assembled.

Article IX.—The United States, in Congress assembled, shall have the sole and exclusive right and power of determining on peace and war, except in the cases mentioned in the sixth article; of sending and receiving ambassadors; entering into treaties and alliances; *provided*, that no treaty of commerce shall be made whereby the legislative power of the respective States shall be restrained from imposing such imposts and duties on foreigners as their own people are subjected to, or from prohibiting the exportation or importation of any species of goods or commodities whatsoever; of establishing rules for deciding, in all cases, what captures on land or water shall be legal, and in what manner prizes taken by land or naval forces in the service of the United States shall be divided or appropriated; of granting letters of marque and reprisal in times of peace; appointing courts for the trial of piracies and felonies committed on the high seas, and establishing courts for receiving and determining finally appeals in all cases of captures; *provided*, that no member of Congress shall be appointed a judge of any of the said courts.

The United States, in Congress assembled, shall also be the last resort on appeal in all disputes and differences now subsisting or that hereafter may arise, between two or more States concerning boundary, jurisdiction, or any other cause whatever; which authority shall always be exercised in the manner following: Whenever the legislative or executive authority, or lawful agent of any State in controversy with another, shall present a petition to Congress, stating the matter in question, and praying for a hearing, notice thereof shall be given, by order of Congress, to the legislative or executive authority of the other State

in controversy, and a day assigned for the appearance of the parties by their lawful agents, who shall then be directed to appoint, by joint consent, commissioners or judges to constitute a court for hearing and determining the matter in question; but if they cannot agree, Congress shall name three persons out of each of the United States, and from the list of such persons each party shall alternately strike out one, the petitioners beginning, until the number shall be reduced to thirteen; and from that number not less than seven, nor more than nine names, as Congress shall direct, shall, in the presence of Congress, be drawn out by lot, and the persons whose names shall be so drawn, or any five of them, shall be commissioners or judges to hear and finally determine the controversy, so always as a major part of the judges who shall hear the cause shall agree in the determination; and if either party shall neglect to attend at the day appointed, without showing reasons which Congress shall judge sufficient, or, being present, shall refuse to strike, the Congress shall proceed to nominate three persons out of each State, and the Secretary of Congress shall strike in behalf of such party absent or refusing; and the judgment and sentence of the court to be appointed, in the manner before prescribed, shall be final and conclusive; and if any of the parties shall refuse to submit to the authority of such court, or to appear or defend their claim or cause, the court shall, nevertheless, proceed to pronounce sentence or judgment, which shall in like manner be final and decisive; the judgment or sentence and other proceedings being in either case transmitted to Congress and lodged among the acts of Congress for the security of the parties concerned; *provided*, that every commissioner, before he sits in judgment, shall take an oath, to be administered by one of the judges of the Supreme or Superior Court of the State where the cause shall be tried, "well and truly to hear and determine the matter in question, according to the best of his judgment, without favor, affection, or hope of reward"; *provided also*, that no State shall be deprived of territory for the benefit of the United States.

All controversies concerning the private right of soil claimed under different grants of two or more States, whose jurisdictions

as they may respect such lands, and the States which passed such grants, are adjusted, the said grants, or either of them, being at the same time claimed to have originated antecedent to such settlement of jurisdiction, shall, on the petition of either party of the Congress of the United States, be finally determined, as near as may be, in the same manner as is before described for deciding disputes respecting territorial jurisdiction between different States.

The United States, in Congress assembled, shall also have the sole and exclusive right and power of regulating the alloy and value of coin struck by their own authority, or by that of the respective States; fixing the standard of weights and measures throughout the United States; regulating the trade and managing all affairs with the Indians, not members of any of the States; *provided*, that the legislative right of any State, within its own limits, be not infringed or violated; establishing and regulating post-offices from one State to another, throughout all the United States, and exacting such postage on the papers passing through the same as may be requisite to defray the expenses of the said office; appointing all officers of the land forces in the service of the United States, excepting regimental officers; appointing all the officers of the naval forces and commissioning all officers whatever in the service of the United States; making rules for the government and regulation of the said land and naval forces, and directing their operations.

The United States, in Congress assembled, shall have authority to appoint a committee, to sit in the recess of Congress, to be denominated a "Committee of the States," and to consist of one delegate from each State, and to appoint such other committees and civil officers as may be necessary for managing the general affairs of the United States under their direction; to appoint one of their number to preside; *provided*, that no person be allowed to serve in the office of President more than one year in any term of three years; to ascertain the necessary sums of money to be raised for the service of the United States, and to appropriate and apply the same for defraying the public expenses; to borrow money or emit bills on the credit of the United

States, transmitting every half-year to the respective States an account of the sums of money so borrowed or emitted; to build and equip a navy; to agree upon the number of land forces, and to make requisitions from each State for its quota, in proportion to the number of white inhabitants in such State, which requisition shall be binding, and thereupon the Legislature of each State shall appoint the regimental officers, raise the men, and clothe, arm and equip them in a soldier-like manner, at the expense of the United States; and the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled; but if the United States, in Congress assembled, shall, on consideration of circumstances, judge proper that any State should not raise men, or should raise a smaller number than its quota, and that any other State should raise a greater number of men than the quota thereof, such extra number shall be raised, officered, clothed, armed, and equipped in the same manner as the quota of each State, unless the Legislature of such State shall judge that such extra number cannot be safely spared out of the same; in which case they shall raise, officer, clothe, arm, and equip as many of such extra number as they judge can be safely spared. And the officers and men so clothed, armed, and equipped shall march to the place appointed, and within the time agreed on by the United States, in Congress assembled.

The United States, in Congress assembled, shall never engage in a war, nor grant letters of marque and reprisal in time of peace, nor enter into any treaties or alliances, nor coin money, nor regulate the value thereof, nor ascertain the sums and expenses necessary for the defense and welfare of the United States, or any of them, nor emit bills, nor borrow money on the credit of the United States, nor appropriate money, nor agree upon the number of vessels of war to be built or purchased, or the number of land or sea forces to be raised, nor appoint a commander-in-chief of the army or navy, unless nine States assent to the same; nor shall a question on any other point, except for ad-

journing from day to day, be determined, unless by the votes of a majority of the United States, in Congress assembled.

The Congress of the United States shall have power to adjourn to any time within the year, and to any place within the United States, so that no period of adjournment be for a longer duration than the space of six months; and shall publish the journal of their proceedings monthly, except such parts thereof relating to treaties, alliances, or military operations as in their judgment require secrecy; and the yeas and nays of the delegates of each State on any question shall be entered on the journal, when it is desired by any delegate; and the delegates of a State, or any of them, at his or their request, shall be furnished with a transcript of the said journal, except such parts as are above excepted, to lay before the Legislatures of the several States.

Article X.—The Committee of the States, or any nine of them, shall be authorized to execute, in the recess of Congress, such of the powers of Congress as the United States, in Congress assembled, by the consent of nine States, shall, from time to time, think expedient to vest them with; *provided*, that no power be delegated to the said committee for the exercise of which, by the Articles of Confederation, the voice of nine States, in the Congress of the United States assembled, is requisite.

Article XI.—Canada acceding to this Confederation, and joining in the measures of the United States, shall be admitted into and entitled to all the advantages of this Union; but no other colony shall be admitted into the same, unless such admission be agreed to by nine States.

Article XII.—All bills of credit emitted, moneys borrowed, and debts contracted, by or under the authority of Congress, before the assembling of the United States, in pursuance of the present Confederation, shall be deemed and considered as a charge against the United States, for payment and satisfaction whereof the said United States and the public faith are hereby solemnly pledged.

Article XIII.—Every State shall abide by the determinations of the United States, in Congress assembled, on all ques-



tions which by this Confederation are submitted to them. And the Articles of this Confederation shall be inviolably observed by every State, and the Union shall be perpetual; nor shall any alteration at any time hereafter be made in any of them, unless such alteration be agreed to in a Congress of the United States and be afterwards confirmed by the Legislatures of every State.

*And whereas*, It hath pleased the Great Governor of the world to incline the hearts of the Legislatures we respectively represent in Congress to approve of and to authorize us to ratify the said Articles of Confederation and perpetual Union: *Know ye* that we, the undersigned delegates, by virtue of the power and authority to us given for that purpose, do by these presents, in the name and in behalf of our respective constituents, fully and entirely ratify and confirm each and every of the said Articles of Confederation and perpetual Union, and all and singular the matters and things therein contained.

And we do further solemnly plight and engage the faith of our respective constituents that they shall abide by the determination of the United States, in Congress assembled, on all questions which by the said Confederation are submitted to them, and that the articles thereof shall be inviolably observed by the States we respectively represent; and that the Union shall be perpetual.

In witness whereof we have hereunto set our hands in Congress. Done at Philadelphia, in the State of Pennsylvania, the 9th day of July, in the year of our Lord, 1778, and in the third year of the Independence of America.

*On the part and behalf of the State of New Hampshire.*

Josiah Bartlett.

John Wentworth, Jr.,  
Aug. 8, 1778.

*On the part and behalf of the State of Massachusetts Bay.*

John Hancock.  
Samuel Adams.  
Elbridge Gerry.

Francis Dana.  
James Lovell.  
Samuel Holton.



*On the part and behalf of the State of Rhode Island and Providence Plantations.*

William Ellery.

Henry Marchant.

John Collins.

*On the part and behalf of the State of Connecticut.*

Roger Sherman.

Titus Hosmer.

Sam'l Huntington.

Andrew Adams.

Oliver Wolcott.

*On the part and behalf of the State of New York.*

James Duane.

William Duer.

Francis Lewis.

Gouverneur Morris.

*On the part and behalf of the State of New Jersey.*

John Witherspoon.

Nathaniel Scudder,

Nov. 26, 1778.

*On the part and behalf of the State of Pennsylvania.*

Robert Morris.

William Clingan.

Daniel Roberdeau.

Joseph Reed,

J. Bayard Smith.

July 22, 1778.

*On the part and behalf of the State of Delaware.*

Thomas McKean,

John Dickinson,

Feb. 13, 1779.

May 5, 1779.

Nicholas Van Dyke.

*On the part and behalf of the State of Maryland.*

John Hanson,

Daniel Carroll,

March 1, 1781.

March 1, 1781.

*On the part and behalf of the State of Virginia.*

Richard Henry Lee.

John Harvie.

John Banister.

F. Lightfoot Lee.

Thomas Adams.

## 400 POWERS OF THE AMERICAN PEOPLE

*On the part and behalf of the State of North Carolina.*

John Penn,	Cornelius Harnett.
July 21, 1778.	John Williams.

*On the part and behalf of the State of South Carolina.*

Henry Laurens.	Richard Hutson.
William Henry Drayton.	Thomas Heyward, Jr.
John Matthews.	

*On the part and behalf of the State of Georgia.*

John Walton.	Edward Telfair.
July 24, 1778.	Edward Langworthy.

The Articles of Confederation were ratified by the States as follows:

South Carolina.....	February 5, 1778
New York.....	February 6, 1778
Rhode Island.....	February 9, 1778
Connecticut.....	February 12, 1778
Georgia.....	February 26, 1778
New Hampshire.....	March 4, 1778
Pennsylvania.....	March 5, 1778
Massachusetts.....	March 10, 1778
North Carolina.....	April 5, 1778
New Jersey.....	November 19, 1778
Virginia.....	December 15, 1778
Delaware.....	February 1, 1779
Maryland.....	January 30, 1781

The ratification by all the States was formally announced to the public March 1, 1781.

APPENDIX IV  
CONSTITUTION OF THE UNITED STATES

AND

ARTICLES IN ADDITION TO AND AMENDMENT OF  
THE CONSTITUTION OF THE UNITED  
STATES OF AMERICA



## CONSTITUTION OF THE UNITED STATES

WE, THE PEOPLE of the United States, in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

### ARTICLE I

Section 1. All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.

Section 2. The House of Representatives shall be composed of members chosen every second year by the people of the several States; and the electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State Legislature.

No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen.

Representatives and direct taxes shall be apportioned among the several States which may be included within this Union, according to their respective numbers, which shall be determined by adding to the whole number of free persons, including those bound to service for a term of years, and excluding Indians not taxed, three-fifths of all other persons. The actual enumeration shall be made within three years after the first meeting of the Congress of the United States, and within every subsequent term of ten years, in such manner as they shall by law direct. The number of Representatives shall not exceed one for every thirty thousand, but each State shall have at least one Representative, and until such enumeration shall be made, the State of New Hampshire shall be entitled to choose three,

Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.

When vacancies happen in the representation of any State, the executive authority thereof shall issue writs of election to fill such vacancies.

The House of Representatives shall choose their Speaker and the other officers; and shall have the sole power of impeachment.

Section 3. The Senate of the United States shall be composed of two Senators from each State, chosen by the Legislature thereof, for six years; and each Senator shall have one vote.

Immediately after they shall be assembled, in consequence of the first election, they shall be divided, as equally as may be, into three classes. The seats of the Senators of the first class shall be vacated at the expiration of the second year, of the second class at the expiration of the fourth year, and of the third class at the expiration of the sixth year, so that one-third may be chosen every second year; and if vacancies happen, by resignation or otherwise, during the recess of the Legislature of any State, the Executive thereof may make temporary appointments until the next meeting of the Legislature, which shall then fill such vacancies.

No person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen.

The Vice-President of the United States shall be President of the Senate, but shall have no vote unless they be equally divided.

The Senate shall choose their other officers, and also a President *pro tempore* in the absence of the Vice-President, or when he shall exercise the office of President of the United States.

The Senate shall have the sole power to try all impeach-



ments. When sitting for that purpose, they shall be on oath or affirmation. When the President of the United States is tried, the Chief Justice shall preside; and no person shall be convicted without the concurrence of two-thirds of the members present.

Judgment in case of impeachment shall not extend further than to removal from office, and disqualification to hold and enjoy any office of honor, trust, or profit under the United States; but the party convicted shall, nevertheless, be liable and subject to indictment, trial, judgment, and punishment according to law.

Section 4. The times, places, and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof, but the Congress may at any time, by law, make or alter such regulations, except as to the places of choosing Senators.

The Congress shall assemble at least once in every year, and such meeting shall be on the first Monday in December, unless they shall by law appoint a different day.

Section 5. Each house shall be the judge of the elections, returns, and qualifications of its own members, and a majority of each shall constitute a quorum to do business; but a smaller number may adjourn from day to day, and may be authorized to compel the attendance of absent members in such manner and under such penalties as each house may provide.

Each house may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.

Each house shall keep a journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either house, on any question, shall, at the desire of one-fifth of those present, be entered on the journal.

Neither house, during the session of Congress, shall, without the consent of the other, adjourn for more than three days, nor to any other place than that in which the two houses shall be sitting.

Section 6. The Senators and Representatives shall receive a compensation for their services, to be ascertained by law, and paid out of the Treasury of the United States. They shall in all cases, except treason, felony, and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house they shall not be questioned in any other place.

No Senator or Representative shall, during the time for which he was elected, be appointed to any civil office under the authority of the United States which shall have been created, or the emolument whereof shall have been increased, during such time; and no person holding any office under the United States shall be a member of either house during his continuance in office.

Section 7. All bills for raising revenue shall originate in the House of Representatives; but the Senate may propose or concur with amendments, as on other bills.

Every bill which shall have passed the House of Representatives and the Senate shall, before it become a law, be presented to the President of the United States; if he approve, he shall sign it, but if not, he shall return it, with his objections, to that house in which it shall have originated, who shall enter the objections at large on their journal and proceed to reconsider it. If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two-thirds of that house it shall become a law. But in all such cases the votes of both houses shall be determined by yeas and nays, and the names of the persons voting for and against the bill shall be entered on the journal of each house respectively. If any bill shall not be returned by the President within ten days (Sundays excepted) after it shall have been presented to him, the same shall be a law in like manner as if he had signed it, unless the Congress by their adjournment prevent its return, in which case it shall not be a law.

Every order, resolution, or vote to which the concurrence of the Senate and House of Representatives may be necessary (except on a question of adjournment) shall be presented to the President of the United States; and, before the same shall take effect, shall be approved by him, or, being disapproved by him, shall be repassed by two-thirds of the Senate and House of Representatives, according to the rules and limitations prescribed in the case of a bill.

Section 8. The Congress shall have power:—

To lay and collect taxes, duties, imposts, and excises, to pay the debts and provide for the common defense and general welfare of the United States; but all duties, imposts, and excises shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

To establish an uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post roads;

To promote the progress of science and useful arts by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Supreme Court;

To define and punish piracies and felonies committed on the high seas and offenses against the laws of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies; but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such part of them as may be employed in the service of the United States, reserving to the States, respectively, the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive legislation, in all cases whatsoever, over such district (not exceeding ten miles square) as may, by cession of particular States and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased, by the consent of the Legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dockyards, and other needful buildings; and,

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

Section 9. The migration or importation of such persons as any of the States now existing shall think proper to admit shall not be prohibited by the Congress prior to the year one thousand eight hundred and eight; but a tax or duty may be imposed on such importation not exceeding ten dollars for each person.

The privilege of the writ of *habeas corpus* shall not be suspended unless when, in case of rebellion or invasion, the public safety may require it.

No bill of attainder, or *ex post facto* law, shall be passed.

No capitation or other direct tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken.

No tax or duty shall be laid on articles exported from any State.

No preference shall be given by any regulation of commerce or revenue to the ports of one State over those of another;

nor shall vessels bound to or from one State be obliged to enter, clear, or pay duties in another.

No money shall be drawn from the Treasury but in consequence of appropriations made by law; and a regular statement and account of the receipts and expenditures of all public money shall be published from time to time.

No title of nobility shall be granted by the United States; and no person holding any office of profit or trust under them shall, without the consent of the Congress, accept of any present, emolument, office, or title of any kind whatever from any king, prince, or foreign state.

Section 10. No State shall enter into any treaty, alliance, or confederation; grant letters of marque and reprisal; coin money; emit bills of credit; make anything but gold and silver coin a tender in payment of debts; pass any bill of attainder, *ex post facto* law, or law impairing the obligation of contracts, or grant any title of nobility.

No State shall, without the consent of the Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws; and the net produce of all duties and imposts laid by any State on imports or exports shall be for the use of the Treasury of the United States; and all such laws shall be subject to the revision and control of the Congress. No State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State or with a foreign power, or engage in war, unless actually invaded or in such imminent danger as will not admit of delay.

## ARTICLE II

Section 1. The executive power shall be vested in a President of the United States of America. He shall hold his office during the term of four years, and, together with the Vice-President, chosen for the same term, be elected as follows:—

Each State shall appoint, in such manner as the Legis-



lature thereof may direct, a number of electors equal to the whole number of Senators and Representatives to which the State may be entitled in the Congress; but no Senator or Representative, or person holding an office of trust or profit under the United States, shall be appointed an elector.

The electors shall meet in their respective States, and vote by ballot for two persons, of whom one at least shall not be an inhabitant of the same State with themselves. And they shall make a list of all the persons voted for, and of the number of votes for each; which list they shall sign and certify, and transmit, sealed, to the seat of the Government of the United States, directed to the President of the Senate. The President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted. The person having the greatest number of votes shall be the President, if such number be a majority of the whole number of electors appointed; and if there be more than one who have such majority, and have an equal number of votes, then the House of Representatives shall immediately choose by ballot one of them for President; and if no person have a majority, then from the five highest on the list the said House shall in like manner choose the President. But in choosing the President the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. In every case, after the choice of the President, the person having the greatest number of votes of the electors shall be Vice-President. But if there should remain two or more who have equal votes, the Senate shall choose from them by ballot the Vice-President.

The Congress may determine the time of choosing the electors, and the day on which they shall give their votes; which day shall be the same throughout the United States.

No person except a natural-born citizen, or a citizen of the United States at the time of the adoption of this Constitution, shall be eligible to the office of President; neither shall any



person be eligible to that office who shall not have attained to the age of thirty-five years, and been fourteen years a resident within the United States.

In case of the removal of the President from office, or of his death, resignation, or inability to discharge the powers and duties of the said office, the same shall devolve on the Vice-President; and the Congress may by law provide for the case of removal, death, resignation, or inability, both of the President and Vice-President, declaring what officer shall then act as President, and such officer shall act accordingly until the disability be removed or a President shall be elected.

The President shall, at stated times, receive for his services a compensation, which shall neither be increased nor diminished during the period for which he shall have been elected, and he shall not receive within that period any other emolument from the United States, or any of them.

Before he enter on the execution of his office he shall take the following oath or affirmation:—

“I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States, and will, to the best of my ability, preserve, protect and defend the Constitution of the United States.”

Section 2. The President shall be commander-in-chief of the army and navy of the United States and of the militia of the several States, when called into the actual service of the United States; he may require the opinion in writing of the principal officer in each of the executive departments upon any subject relating to the duties of their respective offices; and he shall have power to grant reprieves and pardons for offenses against the United States, except in cases of impeachment.

He shall have power, by and with the advice and consent of the Senate, to make treaties, provided two-thirds of the Senators present concur; and he shall nominate and, by and with the advice and consent of the Senate, shall appoint ambassadors, other public ministers and consuls, judges of the Supreme Court, and all other officers of the United States whose

appointments are not herein otherwise provided for, and which shall be established by law. But the Congress may by law vest the appointment of such inferior officers as they think proper in the President alone, in the courts of law, or in the heads of departments.

The President shall have power to fill up all vacancies that may happen during the recess of the Senate by granting commissions, which shall expire at the end of their next session.

Section 3. He shall, from time to time, give to the Congress information of the state of the Union, and recommend to their consideration such measures as he shall judge necessary and expedient. He may, on extraordinary occasions, convene both houses, or either of them; and in case of disagreement between them with respect to the time of adjournment, he may adjourn them to such time as he shall think proper. He shall receive ambassadors and other public ministers. He shall take care that the laws be faithfully executed; and shall commission all the officers of the United States.

Section 4. The President, Vice-President, and all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.

### ARTICLE III

Section 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and inferior courts, shall hold their offices during good behavior; and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

Section 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and mari-

time jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States, between a State and citizens of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States, and between a State, or the citizens thereof, and foreign states, citizens, or subjects.

In all cases affecting ambassadors, other public ministers, and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

Section 3. Treason against the United States shall consist only in levying war against them, or in adhering to their enemies, giving them aid and comfort. No person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.

The Congress shall have power to declare the punishment of treason; but no attainder of treason shall work corruption of blood, or forfeiture, except during the life of the person attainted.

#### ARTICLE IV

Section 1. Full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may, by general laws, prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof.

Section 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

A person charged in any State with treason, felony, or other crime, who shall flee from justice and be found in another

State, shall, on demand of the executive authority of the State from which he fled, be delivered up, to be removed to the State having jurisdiction of the crime.

No person held to service or labor in one State, under the laws thereof, escaping into another, shall, in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up on claim of the party to whom such service or labor may be due.

Section 3. New States may be admitted by the Congress into this Union; but no new States shall be formed or erected within the jurisdiction of any other State; nor any State be formed by the junction of two or more States, or parts of States, without the consent of the Legislatures of the States concerned, as well as of the Congress.

The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States or of any particular State.

Section 4. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and, on application of the Legislature, or of the Executive (when the Legislature cannot be convened), against domestic violence.

#### ARTICLE V

The Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to this Constitution, or, on the application of the Legislatures of two-thirds of the several States, shall call a convention for proposing amendments, which, in either case, shall be valid, to all intents and purposes, as part of this Constitution, when ratified by the Legislatures of three-fourths of the several States, or by conventions in three-fourths thereof, as the one or the other mode of ratification may be proposed by the Congress; *provided*, that no amendment which may be made prior to the year one thousand eight hun-

dred and eight shall in any manner affect the first and fourth clauses in the ninth section of the first article; and that no State, without its consent, shall be deprived of its equal suffrage in the Senate.

## ARTICLE VI.

All debts contracted and engagements entered into before the adoption of this Constitution shall be as valid against the United States under this Constitution as under the Confederation.

This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by oath or affirmation to support this Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States.

## ARTICLE VII

The ratifications of the conventions of nine States shall be sufficient for the establishment of this Constitution between the States so ratifying the same.

*Done in Convention, by the unanimous consent of the States present, the seventeenth day of September, in the year of our Lord one thousand seven hundred and eighty-seven, and of the Independence of the United States of America the twelfth. In witness whereof we have hereunto subscribed our names.*

GEORGE WASHINGTON,  
*President and Deputy from Virginia.*

NEW HAMPSHIRE..John Langdon, Nicholas Gilman.  
 MASSACHUSETTS....Nathaniel Gorham, Rufus King.  
 CONNECTICUT.....William Samuel Johnson, Roger Sherman.  
 NEW YORK.....Alexander Hamilton.  
 NEW JERSEY.....William Livingston, William Patterson,  
                                   David Brearly, Jonathan Dayton.  
 PENNSYLVANIA.....Benjamin Franklin, Robert Morris, Thos.  
                                   Fitzsimmons, James Wilson, Thomas  
                                   Mifflin, George Clymer, Jared Ingersoll,  
                                   Gouverneur Morris.  
 DELAWARE.....George Read, John Dickinson, Jacob  
                                   Broom, Gunning Bedford, Jr., Richard  
                                   Bassett.  
 MARYLAND.....James M'Henry, Daniel Carroll, Daniel of  
                                   St. Tho. Jenifer.  
 VIRGINIA.....John Blair, James Madison, Jr.  
 NORTH CAROLINA..William Blount, Hugh Williamson, Rich-  
                                   ard Dobbs Spaight.  
 SOUTH CAROLINA..John Rutledge, Charles Pinckney, Charles  
                                   Cotesworth Pinckney, Pierce Butler.  
 GEORGIA.....William Few, Abraham Baldwin.

Attest:

WILLIAM JACKSON, Secretary.



# ARTICLES IN ADDITION TO AND AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES OF AMERICA

## ARTICLE I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

## ARTICLE II

A well-regulated militia being necessary to the security of a free State, the right of the people to keep and bear arms shall not be infringed.

## ARTICLE III

No soldier shall, in time of peace, be quartered in any house without the consent of the owner; nor in time of war but in a manner to be prescribed by law.

## ARTICLE IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

## ARTICLE V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces,

or in the militia when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled, in any criminal case, to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

## ARTICLE VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor; and to have the assistance of counsel for his defense.

## ARTICLE VII

In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved; and no fact tried by jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law.

## ARTICLE VIII

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

## ARTICLE IX

The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.

## ARTICLE X

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively or to the people.

## ARTICLE XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against one of the United States by citizens of another State, or by citizens or subjects of any foreign State.

## ARTICLE XII

Section 1. The electors shall meet in their respective States, and vote by ballot for President and Vice-President, one of whom, at least, shall not be an inhabitant of the same State with themselves; they shall name in their ballots the person voted for as President, and in distinct ballots the person voted for as Vice-President; and they shall make distinct lists of all persons voted for as President, and of all persons voted for as Vice-President, and of the number of votes for each, which lists they shall sign and certify, and transmit, sealed, to the seat of the government of the United States, directed to the President of the Senate:—the President of the Senate shall, in the presence of the Senate and House of Representatives, open all the certificates, and the votes shall then be counted; the person having the greatest number of votes for President shall be the President, if such number be a majority of the whole number of electors appointed; and if no person have such majority, then from the persons having the highest numbers, not exceeding three, on the list of those voted for as President, the House of Representatives shall choose immediately, by ballot, the President. But in choosing the President, the votes shall be taken by States, the representation from each State having one vote; a quorum for this purpose shall consist of a member or members from two-thirds of the States, and a majority of all the States shall be necessary to a choice. And if the House of Representatives shall not choose a President, whenever the right of choice shall devolve upon them, before the fourth day of March next following, then the Vice-President shall act as President, as in the case of the death or other constitutional disability of the President. The person having the greatest number of votes as Vice-President shall be

the Vice-President, if such number be a majority of the whole number of electors appointed; and if no person have a majority, then from the two highest numbers on the list the Senate shall choose the Vice-President; a quorum for the purpose shall consist of two-thirds of the whole number of Senators, and a majority of the whole number shall be necessary to a choice. But no person constitutionally ineligible to the office of President shall be eligible to that of Vice-President of the United States.

#### ARTICLE XIII

Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

#### ARTICLE XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion or

other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State Legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may, by a vote of two-thirds of each house, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for loss or emancipation of any slave; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce by appropriate legislation the provisions of this article.

#### ARTICLE XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States, or by any State, on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have power to enforce this article by appropriate legislation.





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# AMONG THE VARIOUS VIEWS

ON

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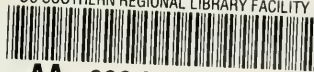








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